(by Christophe Saint-Germain)

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RARE, EARLY EDITION OF THIS FAMOUS TREATISE OF TUDOR LAW, HIGHLY PRAISED BY COKE HIMSELF. THE SHORT TITLE CATALOGUE LOCATED ONLY ONE COPY OF THIS EDITION IN AMERICA.

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THE DIALOGVE in Englisſh, betweene a *Doctor of Diuinitie*, and a Student in the Lawes of England.

Newly corrected and Imprinted, with new *Additions.*

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The first Dialogue in English, betwixt a Doctor of Diuinitie, and a *Student in the Lawes of England, of the grounds of the said Lawes, and of* conscience, newly corrected and eftsoones Imprinted with new Additions.

¶ *The Introduction.*

A Doctor of Diuinitie that was of great acquaintance and familiaritie with a Student in the lawes of England, said thus vnto him : I haue had great desire of long time to know wherupon the Law of England is grounded, but because the most part of the Law of England is written in the French Tongue, therefore I cannot through mine owne studie attaine to the knowledge thereof: for in that Tongue I am nothing expert. And because I haue found thee a faithfull friend to me, in all my businesse, therefore I am bold to come to thee before any other to know thy mind, what be the verie grounds of the law of England as thou thinkest.

St. That would aske a great leasure, & it is also aboue my cunning to doit. Neuertheles, that thou shalt not thinke that I would wilfully refuse to fulfill thy desire, I shal with good wil doe that

that in me is to satisfie thy mind: But I pray thee that thou wilt first shew mee somewhat of other Lawes that pertaine most to this matter, & that Doctors treat of, how Lawes haue begun. And then I will gladly shew thee as me thinketh what be the grounds of the Law of England D.A. I will with good will doe as thou lanest: Wherefore thou shall vnderstand, that Doctors treate of foure Lawes, the which (as me seemeth) pertaine most to this matter. The first is the Lawe Eternall. The second is the Law of Nature of reasonable creatures, the which as I haue heard say, is called by them that be learned in the law of England, the Law of reason The third is the law of God The fourth is the Law of Man. And therefore I will first treat of the Law Eternall.

¶ Of the Law Eternall.

Cap. 1.

LIke as there is in euery artificer a reason of such like things as are to be made by his craft: so likewise it behoueth that in euery gouernor there be reason and a foresight in the governing of such things as shall be ordered & done by him, to them that hee hath the gouernance of. And forasmuch as almightie God is the creator and maker of all creatures, to the which he is compared as a workeman to his workes: and is also the gouernour of all deedes and moouings that bee found in any creature: Therfore as the reason of the wisedome of GOD (in almuch as creatures be created by him) is the reason & foresight

light of all crafts and workes that haue bẽ or shall be, so the reason of the wisedome of God mouing all things by wisedome made to a good end, obtaineth the name & reason of a law, and that is called the Law eternall.

And this law eternall is called the first law, & it is well called the first, for it was before all other lawes, and all other lawes bee derined of it: whereupon Saint Augustine saith in his 1. Booke of Free arbitrement, that in Temporall Lawes, nothing is righteous ne lawfull, but that the people haue derined to them out of the law eternall. wherefore euery man hath right & title to haue þ he hath righteously, of the right wise iudgement of the first reason, which is the law eternall St. But how may this law eternall bee knowne? for as the Apostle writeth in the 5. Chapter of his first Epistle to þ Corinthians, Quæ sunt Dei nemo scit, nisi spiritus Dei. That is to say, No mã knoweth what is in God, but the spirit of God: wherefore it seemeth that he openeth his mouth against heauen, that attempteth to know it. Doct. This Law eternall no man may know as it is in it selfe, but onely blessed soules that see God face to face. But almightie God of his goodnesse sheweth of it as much to his creatures as is necessarie for thẽ, for els god should bind his creatures to a thing impossible: which may in no wise bee thought in him. Therefore it is to be vnderstood, that 3. maner of wais almightie God maketh this law eternall knowne to his creatures reasonable. First, by the light of naturall reason. Secondly, by heauenly reuelatiõ. Thirdly, by order of a

Prince or any other secundarie gouernor that hath power to bind his subiects to a law.

And when the law eternall or the will of God is knowne to his creatures reasonable by the light of naturall vnderstanding, or by the light of naturall reason, that is called the law of reason: and when it is shewed by heauenly reuelation in such manner as hereafter shall appeare, then it is called the Law of God. And when it is shewed vnto him by the order of a Prince or of any other secundarie gouernour, that hath a power to set a Law vpon his subiects, then it is called the Law of man, though originally it be made of God. For lawes made by mã that hath receiued therto power of God, be made by God. Therefore the said three lawes that is to say, the law of reason the law of God and the law of man, the which haue seuerall names after the manner as they bee shewed to man, be called in God, one law eternall.

And this is the law of which it is written, Prouerbiorum octauo, where it is said, Per me reges regnant, & legum conditores, iusta discernunt. That is to say, by me kings raigne, and makers of lawes discerne the troth: and this sufficeth for this time of the law eternall.

¶ Of the law of reason, the which by doctors is called the law of nature of reasonable creatures.

Cap. 2.

FIrst it is to bee vnderstood, that the Law of nature may be considered in two maners, that

that is to say, generally and specially: When it is considered generally, then it is referred to all creatures, aswell reasonable, as unreasonable, for all unreasonable creatures haue vnder a certaine rule to them giuen by nature necessarie for them to the consideration of their being, but of this Law it is not our intent to treat at this time. The law of nature specially considered: which is also called the Law of reason, pertaineth onely to creatures reasonable, that is, man, which is created to the image of God.

And this Law ought to bee kept aswell among Iewes, and Gentiles, as among Christian men, and this Law is alway good and righteous, stirring & inclining a man to good, and abhorring euill. And as to the ordering of the deedes of man it is preferred before the law of God, and it is written in the heart of euerie man teaching him what is to bee done, and what is to be fled: and because it is written in the heart, therefore it may not bee put away, ne it is neuer changeable by no diuersitie of place ne time: and therefore against this law, prescription, statute, nor custome, may not preuaile, and if any bee brought in against it, they bee not prescriptions, Statutes, nor customes, but things void and against Iustice, and all other Lawes: aswell the Lawes of God, as to the acts of men, as other, be grounded thereupon.

Stu. Sith the Law of reason is written in the heart of euerie man, as thou hast said before teaching him what is to bee done, & what is to

be fled, and the which thou sayest may neuer bee put out of the heart, what needeth it then to haue any other law brought in, to order the acts and deeds of the people?

Do. Though the law of Reason may not be chaunged nor wholly put away, Neuertheles before the Law written, it was greatly lost and blinded by euill customes, and by many sins of the people, beside our originall sin. Insomuch that it might hardly bee discerned what was righteous, and what vnrighteous, what was good, and what euill. Wherefore it is necessary for the good order of the people, to haue many things added to the law of reason, aswel by the church, as by seculer Princes, according to the maners of the Countrie and of the people, where such additions should bee executed. And this law of reason differeth from the law of God in two maners. For the Law of God is giuen by reuelation of God, and this law is giuen by a naturall light of vnderstanding. And also the law of God ordereth a man of it selfe by a nigh way to the felicitie that euer shall endure. And the law of reason ordereth a man to the felicity of this life.

St. But what be the things that the Law of reason teacheth to be done, and what to be fled, I pray thee shew me?

Doct. The law of reason teacheth that good is to be loued, and euill is to be fled. Also that thou shalt doe to another that thou wouldest another should doe to thee. And that we may doe nothing against trueth. And that a man must liue peaceably with other. That Iu-

stice

stice is to bee done to euery man, and also that wrong is not to bee done to any man.

And that also a trespasser is worthie to bee punished, and such other: of the which follow diuers other secundarie commaundements, the which be as necessarie conclusions, deriued of the first. As of that commandement that god is to bee beloued, it followeth that a man shall loue his benefactour: for a benefactor in that he is a benefactour, includeth in him a reason of goodnesse, for else he ought not to bee called a benefactour, that is to say, a good doer, but an euill doer. And so in that he is a benefactour, he is to be beloued in all times, and in all places. And this law also suffereth many things to be done, as that it is lawfull to put away force with force. And that it is lawfull for euery man to defend himself and his goods against an vnlawfull power. And this Law runneth with euerie mans law, and also with the Law of God, as to the deeds of man, and must be alwayes kept and obserued, and shall alwayes declare what ought to follow vpon the generall rules of the Law of man, and shall restraine them if they be any thing contrarie vnto it.

And here it is to bee vnderstood, that, after some men, the Law whereby all things were in common, was neuer of the Law of Reason, but onely in the time of extreame necessitie. For they say, that the Law of reason may not bee chaunged, but they say, it is euident that the Law whereby all things should bee in common, is chaunged, wherefore they con-

conclude, that was neuer the Law of Reason.

¶ Of the law of God.

Cap. 3.

The Law of God is a certaine law giuen by reuelation to a reasonable creature, shewing him the will of God, willing that creatures reasonable bee bound to doe a thing, or not to doe it, for obtaining of the felicitie eternall. And it is said for the obtayning of the felicitie eternall, to exclud the laws shewed by reuelation of God for the politicall rule of the people, the which be called Iudicialls. For a law is not properly called the Law of God, because it was shewed by reuelation of God, but also because it directed a mã by the neerest way to the felicitie eternall, as beene the laws of the old Testament, that beene called Morralls, and the lawes of the Euangelists, the which were shewed in much more excellẽt maner, than the law of the old Testamẽt was: for that was shewed by the mediation of an Angell: But the Law of the Euangelists was shewed by the meditation of our Lord Iesu Christ, God and man: and the Law of God is alway righteous and iust, for it is made and giuen after the will of God. And therefore all acts and deeds of man, bee called rughteous and iust, when they bee done according to the Law of God, and bee conformable to it. Also sometime a Law made by man is called the law

law of God: As when a law taketh his principall ground vpon the Law of God, and is made for the declaration or conseruation of the faith, and to put away Heresies, as diuers lawes Canons, and also diuers lawes made by the cõmon people sometime do. The which therefore are rather to bee called the Law of God, than the Law of man. Yet neuertheleſſe, all the Lawes Canon bee not the Lawes of God: for many of them be made onely for the politicall rule and conseruation of the people. Whereupon Iohn Gerſon in the treatiſe of the Spirituall life of the Soule, the second Leſſon, and the third Cozolarie, saith thus: All the Canons of Biſhops nor their decrées bee not the Law of God: For many of them bee made onely for the politicall conseruation of the people. And if any man will say, Bee not all the goods of the Church ſpirituall, for they belong vnto the ſpirituallie, and lead to the ſpirituallie? Wee aunſwere: That in the whole politicall conseruation of the people, there bee ſome ſpecially deputed and dedicated to the ſeruice of God, the which moſt ſpecially (as by an excellencie) are called ſpirituall men, as religious men are. And other, though they walke in the way of God, yet neuertheleſſe, because their office is moſt ſpecially to bee occupied about ſuch things as pertaine to the Common-wealth, and to the good order of the people, they bee therefore called ſecular men or lay men. Neuertheleſſe, the goods of the firſt may no more bee called Spirituall, than the goods of the other, for they be things mere tem-

temporall, and keeping the body as they doe in the other. And by like reason, Lawes made for the politicall order of the Church, be called many times spirituall, or the Lawes of God, Neuertheleſſe, it is but vnproperly. And other be called Ciuill or the Lawes of man. And in this point many be oftimes deceiued, and also deceiue other, the which iudge the things to be spirituall, the which all men know bee things temporall and carnall. Theſe be the words of Iohn Gerſon in the place alledged before. Furthermore, beſide the Law of reaſon, and the law of man, it was neceſſarie to haue the Law of God, for foure reaſons.

The firſt, becauſe man is ordained to ꝑ end of the eternall felicitie, the which exceedeth the proportion and faculties of mans power. Therefore it was neceſſarie that beſide the Lawes of reaſon, and the Law of man, hee ſhould bee directed to his end by a Law of God.

Secondly, forasmuch as for the vncertainty of mans iudgement, ſpecially of things peculiar and ſeldome falling, it happened oft times to follow diuers iudgements of diuers men, & diuerſities of lawes, and therefore to the intent that a man without any doubt may know what he ſhould do, and what he ſhould not doe: It was neceſſarie that hee ſhould bee directed in all his deedes by a Law heauenly giuen by God, the which is ſo apparant, that no man may ſwerue from it, as is the Law of God.

Thirdly, man may only make a law of ſuch things as hee may iudge vpon, and the iudgement of man may not be of inward things, but onely

onely of outward things, and nevertheleſſe it belongeth to perfection that a man bee well ordred in both, that is to ſay aſwell inward as outward. Therefore it was neceſſary to haue the Law of GOD, the which ſhould order a man aſwell of inward things, as of outward things.

The fourth is, becauſe as Saint Auguſtine ſaith in the firſt booke of free Arbitrement, the law of man may not punish all offences: for if all offences ſhould bee punished, the common wealth ſhould be hurt, as is of contracts. For it cannot bee auoided, but that as long as contracts bee ſuffered, many offences ſhall follow thereby, & yet they bee ſuffered for the common wealth. And therefore that no euill ſhould bee vnpunished, it was neceſſary to haue the Law of God that ſhould leaue no euill vnpunished.

¶ Of the Law of Man.

Cap. 4.

The Law of man (the which ſometime is called the law poſitiue) is deriued by reaſon, as a thing which is neceſſarie & probably following of the Law of reaſon, & of the law of God. And that is called probable in that it appeareth to many, & eſpecially to wiſe men, to be true. And therefore in euery law poſitiue well made, is ſomewhat of the Law of reaſon, and of the law of God. And to diſcerne the law of God & the law of reaſon frō the law poſitiue, is verie hard. And though it bee hard, yet it is much

much necessarie in euery morall doctrine, and in all Lawes made for the cõmon wealth. And that the law of man bee iust and righwise, two things bee necessarie, that is to say: wisdome and authoritie. Wisedome, that hee may iudge after reason what is to bee done for the Comminaltie, & what is expedient for a peaceable conuersation and necessarie sustentation of them. Authoritie, that hee haue authoritie to make Lawes, For the Law is derined of Ligare, that is to say, to bind. But the sentence of a wise man doth not bind the Comminaltie, if hee haue no rule ouer them. Also to euerie good Law bee required these properties, that is to say, that it be honest, righ: wise, possible in it selfe, and after the custome of the countrie, conuenient for the place and time, necessarie, profitable, and also manifest, that it be not captious by any darke sentence, ne mixt with any priuat wealth, but all made for the common wealth. And after saint Bridget in the 4. booke in the hundred twentie nine chapter, Euerie good law is ordained to the health of the soule, and to the fulfilling of the Lawes of God, and to induce the people to flie euill desires, and to do good workes. Also the Cardinall of Camerer writeth, whatsoeuer is righteous in the law of Man, is righteous in the law of God. For euerie mans Law must be consonant to the Law of God. And therefore the Lawes of Princes, the commandements of Prelates, the Statutes of Comminalties, ne yet the Ordinance of the Church is not righteous nor obligatorie, but it be consonãt to the law of God.

And

And of such a Lawe of man that is consonant to the Law of God, it appeareth who hath right to Lands and goods, and who not: For whatsoeuer a man hath by such Lawes of man, hee hath righteously. And whatsoeuer is hath against such Lawes, is vnrighteously had.

For Lawes of men not contrarie to the law of God, nor to the law of reason, must bee obserued in the law of the soule: and hee that despiseth them, despiseth God, and resisteth God. And furthermore as Gratian saith, because euill men feare to offend for feare of pain: Therefore it was necessarie that diuers paines should be ordeined for diuers offences, as Philitions ordeined diuers remedies for seuerall diseases. And such paines be ordeined by the makers of Lawes, after the necessitie of the time, and after the disposition of the people. And though that law that ordeined such paines hath thereby a conformitie to the Law of God, (for the law of God commaundeth that the people shall take away euill from amongst themselues) yet they belong not so much to the Lawe of GOD, but that other paines (standing the first principles) might bee ordeined and appointed therefore, that is the law that is called most properly the Law Positiue, and the Law of man.

And the Philosopher said in ꝑ third booke of his Ethikes, that the intent of a maker of a law is to make the people good, and to bring them to vertue. And although I haue somewhat in a generall shewed the whereupon the Law of

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England is grounded (For of neceſſitie it muſt be grounded of the ſaid lawes, that is to ſay, of the law Eternall, of the law of Reaſon, and of the law of God) Neuerthelelle, I pray thee ſhew me more ſpecially whereupon it is grounded as thou thinkeſt, as thou before haſt promiſed to doe.

Stu. I will with good will doe therein that lyeth in mee, for thou haſt ſhewed mee a right, plaine and ſtraight way thereto. Therfore thou ſhalt vnderſtand, that the Law of England is grounded vpon fiue principall grounds. Firſt it is grounded on the Law of Reaſon. Secondly, on the Law of God. Thirdly, on diuers generall Cuſtomes of the Realme. Fourthly, on diuers Principles that be called Maximes. Fiftly, on diuers particuler Cuſtomes. Sixtly, on diuers Statutes made in Parliaments by the King, and by the Common Counſell of the Realme. Of which grounds I ſhall ſpeake by order as they be rehearſed before. And firſt of the Law of Reaſon.

¶ Of the firſt ground of the Law of England.

Cap. 5.

The firſt ground of the Law of England is the Law of Reaſon, whereof thou haſt treated before in the 2. Chap. the which is is kept in this Realme, as it is in all other Realmes, as of neceſſitie it muſt needs be (as thou haſt ſaid before.) D. But I would know what is caled the law of Nature after the lawes of

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England. St. It is not vsed among them that bee learned in the Lawes of England to reason what thing is commanded or prohibited by the law of nature, & what not, but all the reasoning in that behalfe is vnder this maner. As when any thing is grounded vpon the law of nature, they say, that reason will þ such a thing be done, and if it be prohibited by the law of nature, they say it is against reason, or that reason will not suffer that to be done. Doct. Then I pray thee shew me what they that be learned in the lawes of the realme hold to be commaunded or prohibited by the law of nature, vnder such termes and after such manner as is vsed among them that be learned in the said lawes.

St. There be put by them þ be learned in the lawes of England two degrees of the Law of Reason, that is to say, the law of reason primary, & the law of reason secundary: by the law of reason primarie be prohibited in the Lawes of England murder (that is þ death of him that is innocent) periurie, deceit, breaking of the peace, & many other like. And by the same law also, it is lawfull for a man to defend himselfe against an vniust power, so he kepe due circũstance. And also, if any promise be made by man as to the bodie. it is by the law of reason bold in the lawes of England. The other is called the law of secundarie reason, the which is diuided into two branches, that is to say, into the lawe of secundarie reason generall, and into a law of secundarie reason particular. The law of a secundarie reason generall, is grounded and derined of the generall Law, or generall

custome of propertie, whereby goods moueable and vnmoueable be brought into a certain property, so that euerie man may know his owne thing. And by this braunch bee prohibited in the Lawes of England disseisins, trespasse in lands & goods, rescusse, theft, vnlawfull withholding of another mans goods, & such other. And by the same law it is a ground in the law of England, that satisfaction must be made for a trespasse, and that restitution must be made of such goods as one man hath that belong to another man, the debts must be paid, couenats fulfilled, & such other. And because disseisins, trespasse in lands and goods, theft, & other, had not beene knowne, if the lawe of propertie had not bin ordained: Therefore all things that be derived by reason out of the said law of property, be called the law of reason secundary generall, for the law of Property is generally kept in all countries.

The law of reason secundarie particular, is the law that is deriued vpon diuers Customes generall and particular, & of diuers Maximes and Statutes ordained in this realme. And it is called the law of reason secundarie particular, because the reason in that case is deriued of such a law that is onely holden for law in this realme, and in none other realme.

Doct. I pray thee shew me some special case of such a law of Reason secundarie particular for an example. St. There is a Law in England, which is Law of custome, that if a man take a Distresse lawfully, that he shall put it in pound ouert, there to remaine till hee bee satisfied

fied of that her distrained for. And then thereupon may bee asked this question, that if the beasts die in pound for lacke of meat, at whose perill die they, whether die they at the perill of him that distrained, or of him that oweth the beasts? D. If the law bee as thou sayest, and that a man for a iust cause taketh a distresse, & putteth it in the pound Quert, and no Law compelleth him that distraineth to giue them meat, then it seemeth of reason that if the distresse die in pound for lacke of meat, that it died at the perill of him that oweth the beasts, and not of him that distrained, for in him that distrained there can be alligned no default, but in the other may bee alligned a default, because the rent was unpaid. Stu. Thou hast giuen a true iudgement, and who hath taught thee to doe so, but reason derined of the said generall custome? And the law is so full of such secundarie reasons derined out of the generall Customes and Maximes of the realme, that some men haue affirmed that al the law of the realm, is the law of reason. But that cannot be proued as me seemeth, as I haue partly shewed before, and more fully will shew after. And it is not much vsed in the Lawes of England, to reason what law is grounded vpon the Law of the first reason Primarie, or on the Law of reason secundarie, for they bee most commonly openly knowne of themselues, but for the knowledge of the Law of reason secundarie is greater difficultie, and therefore therein dependeth much the manner and forme of arguments in the Lawes of England.

^ generall

^ particul

And it is to be noted that all the deriuing of Reason in the Law of England proceedeth of the first principles of the law, or of something that is derined of them: and therefore no man may right wisely iudge ne groundly reason in the lawes of England, if he be ignorant in the first principles. Also all birds, fowles, wild beasts of Forrests & Warren, & such other bee excepted by the Lawes of England, out of the said general law and custome of propertie. For by the lawes of the realme no property may be of them in any person, vnles they be tame. Nevertheless the egs of Hauks, Herons, or such other as build in the ground of any person, bee adiudged by the said Lawes to belong to him that oweth the ground.

¶ Of the second ground of the law of England.

Cap. 6.

The second ground of the law of England is the law of God, & therefore for punishment of thē that offend against the Law of God, it is enquired in many courts in this Realme, if any hold any opinion secretly or in any other manner against the true Catholike Faith: and also if any general custome were directly against the law of God, or if any statute were made directly against it: as it were ordained that no almes should be giuen for no necessity, the custom & statute were void. Nevertheleſſe the statute made in the 34. yeare of king Ed. 3. wherby it is ordained that no man vnder paine of imprisonment shall giue any almes to any

any valiant beggers ꝧ may wel labor, that they may so be compelled to labour for their liuing, is a good statute, for it obserueth the intent of the law of God. And also by authoritie of this law, there is a ground in the lawes of England that he that is Accursed shall maintaine no action in the kings court, except it be in very few cases, so that the same excõmunication bee certified before the kings Justices in such maner as the law of the Realme hath appointed: and by the authoritie also of this ground, the law of England admitteth the spirituall iurisdiction of Dismes and offerings, and of all other things that of right belong vnto it, and receiueth also all lawes of the Church onely made, & that exceed not the power of them that made the. Insomuch that in many cases it behoueth ꝧ kings Justices to iudge after the lawes of the church. Do. How may that be, that the kings Justices should iudge in the kings courts after the law of the Church? for it seemeth that the Church should rather giue iudgemẽt in such things as it may make lawes of, than the kings Justices. St. That may be done in many cases, whereof I shall for an example put this case. If a writ of right of ward bee brought of the bodie &c. And the tenãt confessing the tenure, & the nonage of the infant saith, that the infant was maried in his auncestors daies &c. whereupon xii. men be sworne, which giue this verdict, that the infant was maried in the life of his auncestors, and that the woman in the life of his auncestour sued a diuorce, whereupon sentence was giuen that they should be diuorced, and that the

heire appealed, which hangeth yet undiscussed, praying the ayd of the Justice to know whether the infant in this case shall be said maried or no. In this case if the law of the Church be that the said sentence of Diuorce standeth in his strength & vertue vntil it be annulled vpon the said appeale: That the infant at the death of his ancestor, was vnmaried, because the first marriage was annulled by that diuorce: and if the law of the church be, that the sentence of the diuorce standeth not in effect till it bee affirmed vpon the said appeale, then is the infant yet maried, so that the value of his marriage cannot belong vnto the Lord, and therefore in this case iudgement conditional shalbe giuen &c. and in likewise the Kings Justices in many other cases shall iudge after the Law of the Church, like as the spirituall Iudges must in many cases, form their iudgemēt after the kings lawes. D. How may that bee, that the spirituall Iudges should iudge after the kings lawes? I pray thee shew mee some certaine case thereof. Stu. Though it be somewhat a digression from our first purpose, yet I will not withstay thy desire, but will with good will put thee a case or two thereof, that thou maist the better perceiue what I meane. If A. & B. haue goods iointly, and A. by his last will bequeath his portion therein to C. & maketh the said B. his Executor & dieth, and C. alleth the execution of this will in the spiritual court: in this case the Iudges there be bound to iudge that will to be void, because it is void by the lawes of this realme. And likewise if a man bee outlawed, and after

by

by his will bequeath certaine goods to John at Stile, & make his executors and dye, the king seiseth his goods & after giueth them againe to the executors, & after I. at Stile sueth a citation out of the spirituall court against the executors, to haue execution of the will: in this case the Iudges of the spirituall court must iudge ȳ will to be void, as the law of the realme is that it is, and yet there is no such law of forfeiture of goods by outlawrie in the spirituall law.

¶ Of the third ground of the Law of England. Cap. 7.

The third ground of the law of England, standeth vpon diuers Generall customes of old time vsed throughout all the realme, which haue bin accepted and approued by our soueraigne lord the K. & his progenitors, & all his subiects: & because the said customs be neither against the Law of God, nor the Law of reason, and haue beene alway taken to bee good and necessarie for the commonwealth of all the Realme: Therefore they haue obtained the strength of the law, insomuch that he that doth against them, doth against Iustice: and these be the customes ȳ properly be called the Common Law: and it shall alway be determined by the Iustices whether there be any such generall customs or not, and not by 12. men: and of these generall customes, and of certaine principles ȳ be called Maximes, which also take effect by the old custome of the Realme (as shall appeare in the Chapter next following) dependeth most part of the law of this Realme,

And therefore our soueraigne lord the king at his Coronation among other things taketh a solemne oath, that he shall cause all the customs of his realme faithfully to be obserued. Do. I praie thee shew mee some of these generall customes. St. I will with good will, & first I shall shew thee how the custome of the Realme is the verie ground of diuers Courts in the Realme, that is to say, of the Chauncery, of the K. bench of the common pleas, and the Exchequer, the which bee Courts of record, because none may sit as Iudges in these courts but by the kings letters patents. And these Courts haue diuers authorities, whereof it is not to treat at this time. Other Courts there be also only grounded by the custome of the realm, that bee of much lesse authoritie than the courts before rehearsed. As in euerie shire within the realme, there is a court that is called the countie, & another that is called the sheriffs Torne, & in euery manor is a court þ is called a court baron, and to euery faire & market is incident a Court that is called a court of Pipowders. And though in some statutes is made mention sometime of the said Courts, yet neuertheless of the first institution of the said courts, & that such Courts should bee, there is no Statute nor law written in the Lawes of England. And so all the ground and beginning of the sayde courts depend vpon the custome of the realme, the which custome is of so high authoritie, that the said courts nc their authorities may not be altered, ne their names changed without Parliament.

Also

Also by the old custome of the Realme, no man shall be taken, imprisoned, disseised, nor otherwise destroyed, but he be put to answere by the law of the land, and this custome is confirmed by the statute of Magna charta cap. 26.

Also by the old custome of the Realme, all men great and small shall do and receive iustice in the kings Courts, and this custome is confirmed by the statute of Marlb. cap. 1.

Also by the old custome of the Realme, the eldest sonne is onely heire to his Ancestor, and if there be no sonnes but daughters, then all the daughters shall bee heires. And so it is of sisters and other kinswomen. And if there bee neither sonne, daughter, brother, nor sister, then shal the inheritance descend to the next kinsmā or kinswoman of the whole blood to him that had the inheritaunce, of how many degrees soeuer they be from him. And if there be no heire generall nor speciall, then the land shall escheat to the Lord of whom the land is holden.

Also by the old custome of the realme, lands shall neuer ascend, or descend, from the sonne to the father or mother, nor to any other ancestor in the right line, but it shall rather escheat to the Lord of the fee.

Also if any Alien haue a sonne that is an Alien, and after is made Denizen, and hath another sonne, and after purchaseth lands & dyeth, the youngest sonne shall inherite as heire, and not the eldest.

Also if there be three brethren, & the middest brother purchase Landes and dyeth without heire of his body, the eldest brother shall inherit as

as heire to him, and not the ponger brother.

And if land in fee simple descend to a man by the part of his father, & he dieth without heire of his bodie, then the inheritance shall descend to the next heir of the part of his father. And if there be no such heire of the part of his father, then if the father purchaseth the lands, it shall go to the next heire of the fathers mother, & not to the next heire of the sonnes mother, but it shall rather escheat to the Lord of the fee. But if a mã purchase lands to him & to his heires, & die without heire of his body, as is said before, thẽ the land shal descend to the next heir of the part of his father, if there be any, & if not, then to the next heire of the part of his mother.

Also the sonne purchaseth lands in fee, and dieth without heire of his bodie, the Land shall descend to his uncle, and shall not ascend to his father: But if the father haue a sonne though it bee many yeares after the death of the elder brother, yet that sonne shall put out his uncle, and shall inioy the Land as heire to the elder brother for euer.

Also by the custome of the Realme, the child that is borne before espousels is Bastard, and shall not inherit.

Also the custome of the realm is, that no maner of goods nor chattels real nor personal shal neuer go to the heire, but to the executors, or to the Ordinarie, or administrators.

Also the husband shall haue all the chattells personals that his wife had at the time of the espousels, or after, and also chattels reall if he ouerliue his wife: But if he sell or giue away

thē

the chatteis reals & die, by that sale or gift the interest of the wife is determined, or else they shall remain to the wife, if she ouerliue her husband: also the husband shal haue all the inheritance of his wife, wherof he was seised in deed in the right of his wife during the esponsels in fee, or in fee taile generall, for terme of life, if he haue any child by her, to hold as tenant by the curtesie of England, & the wife shall haue the third part of the inheritance of her husband, wherof he was seised in deed or in law after the esponsels &c. But in that case the wife at the death of her husband must be of the age of nine pere or aboue, or els she shal haue no dowrie. D. What if the husbād at his death be within the age of nine peres? S. I suppose she shal yet haue her dower: also the old Law & Custome of the Realme is, that after the death of euery tenant that holdeth his land by knights seruice, the Lord shall haue the ward and mariage of the heir, til the heir come to the age of 21. yeares, & if the heir in that case be of full age at the death of his ancestor, thē he shal pay to his Lord his relefe, which at the cōmon law was not certaine, but by the stat. of Mag ch. it is put in certain: that is to say, for euery whole knights fee to pay C. s. and for a whole Baronie to pay a C. marks for relefe, & for a whole Erledom to pay a C. l. and after the rate. And if the heire of such a tenant be a woman, & she at the death of her ancestor be within the age of 14. yeares, then by the common law she should haue bin in ward onely til 14. yeares, but by the stat. of 52. H. 3. in such case she shall be in ward till 16. yeres.

And

And if at the death of her auncestor shee bee of the age of 14. yeares or aboue, she shall be out of ward, though the land be holden of the king, & then she shall pay relefe as an heire male shall.

Also of lands holden in Socage, if the auncestor die, his heire being within the age of 14. yeares, the next friend of the heire to whom the inheritance may not discend shal haue the ward of his bodie and lands, till he shall come to the age of 14. yeares, and then hee may enter. And when the heire cõmeth to the age of 21. yeares, then the gardein shall yeld him an account for the profits thereof by him receiued

Also, such an heire in socage for his relefe shall double his rent to the Lord the yeare following the death of his auncestor: As if his auncestor held by xx. s. rent, the heire in the yere following shall pay the xl s. for his rent, and other xl. s. for his relefe, and the relefe he must pay, though he be within age at the death of his auncestor.

Also, there is an old Law and Custome in this Realme, that a freehold by way of feoffement, gift, or leafe, passeth not without Liuerie of seisin be made bythe lãd according, though a deed of Feoffement be thereof made & deliuered: But by way of surrender, partition, and exchange, a freehold may passe without liuerie.

Also if a man make a will of land, whereof he is seised in his demeine as of Fee, that will is void: but if it had stood in Feoffees hand, it had beene good. And also in London such a Will is good by the custome of the citie if it be inrolled.

Also a leafe for terme of yeres is but a chattel by

by the law, and therefore it may passe without any liuerie of seisin: but otherwise it is of a state for terme of life for that it is a Freehold in the Law, and therefore liuerie must be made or els the Freehold passeth not.

Also by the old custome of the realme, a man may distraine for rent seruice of cõmon right: and also for a rent reserued vpon a gift in taile, a lease for terme of life, of peres, and at will, & in such case the Lord may distraine the beasts of tenants, assone as they come vpon the ground, but the beasts of strangers that come in but by maner of an escape, he may not distrain till they haue bẽ tenant & couchant vpon the ground: but for debt vpon an obligation, nor vpon a contract, nor for account, ne yet for arrerages of account, nor for no maner of trespasse, reparations, nor such other, no man may distraine.

And by the old Custome of the realme all issues that shall bee ioyned betweene partie and party in any court of record within the realme, except a few whereof it needeth not to treat at this time, must be tried by xii. free & lawful men of the viſne that bee not of affinitie to none of the parties: and in other courts that be not of record, as in the county, court baron, hundred & such other like, they shall be tried by the oath of the parties, & not otherwise, vnles the parties assent that it shall be tried by the homage. And it is to be noted that lords, barons, & all peres of the realme bee excepted out of such trialls if they will, but if they will wilfully bee sworne therein, some say it is no errour: and they may if they will haue a writ out of the Chancery directed

reuerted to the shyrriffe, commanding him that hee shall not impannell them vpon no enquest.

And of this that is said before it appeareth, that the customes aforesaid nor other like vnto them, whereof bee very many in the lawes of England, cannot be proued to haue the strength of law onely by reason. For how may it bee proued by reason that the eldest sonne shall only inherite his father, and the younger to haue no part, or that the husband shall haue the whole land for terme of his life as tenant by the curtesie, in such manner as before appeareth, and that the wife shall haue onely the third part in the name of the dower, & that the husband shall haue all the goods of his wife as his owne, and that if hee die liuing the wife, that his executors shall haue the goods, and not the wife: all these and such other cannot be proued onely by reason that it should be so and no otherwise, although they bee reasonable, and that with the custome therein vsed sufficeth in the Law, and a statute made against such generall customes ought to be obserued, because they be not meerly the law of reason.

Also the law of propertie is not the law of reason, but a law of custome, howbeit that it is kept, and is also most necessary to be kept in all realms, and among all people, and so it may be numbred among the generall customes of the realme, and it is to vnderstand that there is no statute that treateth of the beginning of the said customs, ne why they should be holden for law, and therefore after them that be learned in the lawes of the realm, the old custome of the realm is

is the only and sufficient authoritie to them in that behalfe: and I pray thee shew mee what Doctors hold therein, that is to say, whether a custome only bee a sufficient authoritie of any Law. Do. Doctors hold that a Law grounded upon a custome is the most surest Lawe, but this thou must alwaies understand therewith that such a custome is neither contrarie to the law of reason, nor the law of God. And now I pray thee shew mee somewhat of the Maxi-mes of the law of England, whereof thou hast made mention before in the 4. Chapter. Stu. I will with good will.

¶ Of the 4. ground of the law of England. Cap. 8.

The 4 ground of the law of England standeth in diuers principles that be called in the law Maximes, the which haue bin alwaies taken for law in this realm, so that it is not lawfull for any that is learned to deny thē: for euerie one of those Maxtimes is sufficient authoritie to himselfe. And which is a Maxtime, and which not, shall alway be determined by the Iudges, and not by vij. men. And it needeth not to assigne any reason, why they were first receiued for Maxtimes, for it sufficeth that they be not against the Law of reason, nor the law of God, & that they haue alway bin taken for a law. And such Maxtimes be not only holden for lawe, but also other cases like vnto thē, and all things that necessarily followe vpon the same, are to be reduced to ꝑ like law, & therfore most commōly there be assigned some reasōs or con-

consideration why such Maximes be reasonable, to the intent that other cases like, may the more conuenētly be applied to them. And they bee of the same strength & effect in the law as Statutes be. And though the generall customes of the Realme, be the strength & warrant of the said Maximes as they bee of the generall customes of the realme, yet because the said generall customes be in maner knowne through the Realme, aswell to them that be vnlearned as learned, and may lightly bee had & knowne, and that with little studie; and the Maximes bee only knowne in the Kings Courts, or among them that take great studie in the Law of the Realme, and among few other persons: therefore they bee set in this writing for seuerall grounds, and hee that listeth may so accompt them, or if hee will, hee may take them for no ground, after his pleasure. Of which Maximes I shall hereafter shew thee part.

First there is a Maxime, that Escuage vncertaine maketh Knights seruice.

Also there is another Maxime, that Escuage certaine maketh socage.

Also that he that holdeth by Castel gard, holdeth by knights seruice, but hee holdeth not by Escuage. And that hee that holdeth by xx.s. to the gard of a castell, holdeth by socage.

Also there is a Maxime, that a Discent taketh away an entrie

Also, that no Prescription in Lands maketh a right.

Also, that a Prescription of rent and profits appzeuder out of land, maketh a right.

Also,

Also that the limitation of a prescription generally taken, is from the time that no mans mind runneth to the contrary.

Also that assignes may be made vpon lands giuen in fee, for terme of life, or for terme of yeres though no mention be made of assignes: and the same law is of a rent that is granted, but otherwise it is of a warranty and of a couenant.

Also that a condition to auoid a freehold cannot bee pleaded without deed, but to auoid a gift of chattell it may bee pleaded without deed.

Also that a release or confirmation made by him that at the time of the release or confirmation made, had no right, is void in the Law, though a right come to him after, except it bee with warrantie, and then it shal bar him of all right that hee shall haue after the warrantie made.

Also that a right or title of action that onely dependeth in action, cannot be giuen nor granted to none other but onely to the tenant of the ground, or to him that hath the reuersion or remainder of the same.

Also that in an action of debt vpō a contract, the defendant may wage his Law, but otherwise it is vpon a lease of Landes for terme of yeres, or at will.

Also if that any exigent in case of felonie bee awarded against a man: he hath therby forthwith forfeited his goods to the king.

Also if the sonne bee attainted in the life of the father, and after hee purchaseth his charter

of pardon of the king, and after the father dyeth: In this case the land shall escheate to the Lord of the fee, in so much that though hee haue a yonger brother, yet the land shall not descend to him: for by the attainder of the elder brother the bloud is corrupt, and the father, in law, dyed without heire.

Also if an Abbot or Prior alien the Landes of his house and dyeth, in this case, though his successor haue right to the lands, yet he may not enter, but hee must take his action that is appointed him by law.

Also, there is a Maxime in the law, that if a villaine purchase landes and the Lord enter, he shall inioy the land as his owne: but if the villain alien before the Lord enter, the alienation is good. And the same law is of goods.

Also, if a man steale goods to the value of twelue pence or aboue, it is felony, and he shall dye for it. And if it bee vnder the value of xij. pence, then it is but petite larceny, and hee shall not dye for it, but shall be otherwise punished after the discretion of the Iudges, except it bee taken from the Person: for if a man take any thing how little soeuer it bee, from a mans person felontously, it is called robberie, and hee shall die for it.

Also hee that is arraigned vpon an Inditement of Felony shall be admitted in fauour of life to challenge xxxbj. Iurors peremptorily, but if hee challenge any aboue that number, the Law taketh him as one that hath refused the Law, because he hath refused three whole Enquests, and therefore hee shall dye: but with

with cause hee may challenge as many as hee hath cause of challenge to. And further it is to be vnderstood, that such peremptorie challenge shall not be admitted in appeale, because it is at the suit of the partie.

Also, the land of every man is in the Law enclosed from other, though it lie in the open field. And therefore if a man doe trespas therein, the writt shall be Quare clausum fregit.

Also the rents, commons of pasture, of turbarie, reuersions, remainders, nor such other things which lie not in manuall occupation, may not bee giuen nor graunted to none other without writing.

Also that hee that recouereth debt or damages in the Kings Courts by such an action wherein a Capias lay in the Processe, may within a yeare after the recouerie, haue a Capias ad satisfaciendum to take the bodie of the defendant, and to commit him to prison till hee haue paid the debt and damages: but if there lay no Capias in the first action, then the plaintife shall haue no Capias ad satisfaciendum, but must take a Fieri facias, or an Elegit within the yeare, or a Scire facias after the yeare, or within the yeare if he will.

Also, if a release or confirmation be made to him, that at the time of the release made had nothing in the Land &c. the release or confirmation is void, except in certaine cases, as to vouch, and certaine other which need not here to be remembred.

Also there is a Maxime in the law of England, that the King may disseise no man, nor

that no man may disseise the King, ne pull any reuersion or remainder out of him.

Also the Kings excellencie is so high in the law, that no freehold may be giuen to the king, ne bee derriued from him, but by matter of Record.

Also there was sometime a Maxime and a Law of England, that no man should haue a writ of right, but by special suit to the king, for a fine to bee made in the Chancerie for it. But these Maximes be changed by the stat. of Magna charta cap. 16. where it is said thus. Nulli negabimus, nulli vendemus rectum vel iustitiam. And by the words Nulli negabimus, a man shall haue a writ of right of course in the Chancerie without suing to the King for it. And by the words Nulli vēdemus, he shall haue it without fine: so, many times the old Maximes of the Law be changed by statutes. Also though it bee reasonable, that for the manifold diuersities of actions that be in the Lawes of England, that there should bee diuersities of Proces, as in the reall actions after one maner and in personall actions after another manner: Yet it cannot be proued meerely by reason, that the same Proces ought to bee had and none other: for by Statute it might be altered. And so the ground of the said Proces is to bee referred onely to the Maximes and Customs of the Realme.

And I haue shewed thee these Maximes before rehearsed, not to the intent to shew thee specially what is the cause of the law in them, for that would aske a great respite. But I haue

haue shewed them only, to the intent that thou maist perceiue that the said Maximes & other like, may bee conuenientlie set for one of the grounds of the Lawes of England. Moreouer there be diuers cases, whereof I am in doubt whether they be only Maximes of the law, or that they be grounded vpon the law of reason, wherein I pray thee let mee heare thine opinion.

Do. I pray thee shew those cases that thou meanest, and I shall make thee answer therein as I shall see cause.

¶ Hereafter follow diuers cases, wherein the Student doubteth whether they be only Maximes of the Law, or that they bee grounded vpon the Law of Reason.

Cap. 9.

The law of England is, that if a man cõmand another to do a trespasse, & he doth it, that the commander is a trespasser.

And I am in doubt whether that it be onely by a Maxime of the law, or that it be by the Law of reason.

Also, I am in doubt vpon what Law it is grounded, that the accessorie shall not be put to answere before the principall &c.

Also, the law is, that if an Abbot buy a thing that commeth to the vse of the house, and dieth, that his successor shall be charged. And I am somewhat in doubt vpon what ground that

Law dependeth.

Also, that hee that hath possession of land, though it be by disseisin, hath right against all men, but against him that hath right.

Also, that if an action realle be sued against any man that hath nothing in the thing demanded, the writ shall abate at the common Law.

Also, that the alienation of the tenant hanging the writ, nor his entrie into religion, or if he be made a knight, or if she be a woman and take an husband hanging the writ, that the writ shall not abate.

Also, if land and rent that is going out of the same land, come into one mans hand of like estate, and like surette of title, the rent is extinct.

Also, if land discend to him that hath right to the same land before, he shall be remitted to his better title if he will.

Also, if two titles be concurrant together, that the eldest title shall be preferred.

Also, that everie man is bound to make recompence for such hurt as his beasts shall doe in the corne or grasse of his neighbour, though he know not that they were there.

Also, if the demandant or plaintife hanging his writ, will enter into the thing demaunded, his writ shall abate. And it is many times verie hard & of great difficultie to know what cases of the Law of England be grounded upon the Law of reason, and what upon customs of the Realme, and though it bee hard to discusse it, it is very necessary to be knowne, for the knowledge of the perfect reason of the

Law;

law: & if any man think that these cases before rehearsed be grounded upon the law of reason, then he may referre them to the first ground of the law of England, which is the law of reason, whereof is made mention in the 5. chapter. And if any man thinke that they bee grounded upon the law of custome, then he may refer thē to the Maximes of the law, which be assigned for the fourth ground of the Law of England, whereof mention is made in the 8. Cha. as before appeareth.

Do. But I pray thē shew me by what authority it is proued in the lawes of England, that the cases which thou hast put before in the 8. Chap. and such other which thou calleste Maxims ought not to be denied, but ought to be taken as Maximes. For sith they cannot bee proued by reason as thou agreest thy selfe they cannot, they may as lightly bee denied as affirmed, vnles there be some sufficient authority to approue them.

Stu. Many of the Customes and Maxims of the Lawes of England bee knowne by the vse and the custome of the realme so apparantly that it needeth not to haue any Law written thereof. For what needeth it to haue any Lawe written that the eldest son shall inherite his father: or that all the daughters shall inherite together as one heire, if there bee no sonne: or that the husband shall haue the goods and chattels of his wife that shee hath at the time of the espousels, or after: or that a bastard shall not inherite as heire: or the executors shall haue the disposition of all the goods of

their testator: and if there be no executors that the Ordinarie shall haue it, & the heire shal not meddle with the goods of his auncestor, but if any particular customes helpe him.

The other Maximes & customes of the law þ be not so openly knowne among the people, may be knowne partly by the Law of Reason, and partly by the bookes of the Lawes of England called Yeares and Termes, and partly by diuers Records remaining in the K. Courts and in the Treasorie: and specially by a booke called the Register, and also by diuers Statutes wherein many of the said Customes & Maximes be oft recited, as to a diligent Searcher will euidently appeare.

¶ Of the fift ground of the Law of England.

Cap. 10.

The fift ground of the Law of England standeth in diuers particular customs vsed in diuers counties, townes, cities, and lordships in this realme, the which particular customes, because they be not against the law of reason, nor the law of God, though they bee against the said generall Customes or Maximes of the Law, yet neuertheless they stand in effect and be taken for law: but if it rise in question in the kings courts, whether there be any such particular custome or not, it shall bee tried by xij men, and not by the Iudges, except the same particular custome bee of Record in the

the same Court. Of which particular Customes, I haue hereafter noted some for an example.

First there is a custome in Kent that is called Gauelkind, that all the brethren shall inherit together, as sisters at the Common Law.

Also there is another particular Custome, that is called Burghenglish, where ỹ younger sonne shall inherit before the eldest, and that custome is in Nottingham.

Also there is a custome in the Citie of London, that freemen there, may by their testament inrolled, bequeath their lands that they bee seised of to whom they will, except to Mortmaine. And if they be Citizens and Freemen, that they may also bequeath their Landes to Mortmaine.

Also in Gauelkind, though the Father bee hanged, the sonne shall inherite. For their custome is, The Father to the bough, the Son to the plough.

Also in some Countries the wife shall haue the halfe of the husbands lands in the name of her dowery, as long as she liueth sole.

And in some countrie the husband shall haue the halfe of the inheritance of his wife, though he haue no issue by her.

Also in some Countrie an Infant when hee is of age of xv. yeres may make a feoffement, and the feoffement good. And in some Countrey when he can meat an elle of cloth.

¶ Of the sixt ground of the Law of England.

Cap.

Cap. 11.

THe first ground of the Law of England standeth in diuers statutes made by our Soueraign Lord the King & his progenitors, & by the Lords spirituall & temporall, and the Commons in diuers Parliaments, in such cases where the law of reason, the law of God, Customes, Maximes, ne other grounds of the law seemed not to be sufficient to punish euill men, and to reward good men. And I remember not, that I haue seene any other grounds of the Law of England, but onely these that I haue before remembred. Furthermore it appeareth of that I haue said before, that oft times two or three grounds of the law of Englād must bee ioined together, or that the plaintif can open & declare his right, as it may appeare by this example. If a man enter into another mans land by force, and after maketh feffement for maintenāce to defraud the plaintife from his action: In this case it appeareth that the said vnlawfull entrie is prohibited by the Law of reason, but the plaintife shall recouer treble dammages, that is by reason of the statute made in the 8. peare of king H 6. cap. 9. And that the damages shalbe cessed by xij. mē, that is by the custome of the realme. And so in this case, three grounds of ȳ law of England maintaine the plaintifes action.

And so it is in diuers other cases that nēde not to be remembred now. And thus I make an end for this time, to speake any further of ȳ grounds of the law of England. D. I thanke thee

thee for the great paine that thou hast taken therein. Nevertheles, forasmuch as it appeareth that thou hast said before, that the learned men of the Law of England pretend to verifie, that the Law of England will nothing do, ne attempt against the law of Reason, nor the Law of God, I pray thee answere mee to some questions grounded upon the Law of England, how as thou thinkest, the Law may stand with reason or conscience in them.

St. Put the case, and I shall make answere therein as well as I can.

¶ The first question of the Doctor, of the Law of England and conscience.

Cap. 12.

I haue heard say, that if a man that is bound in an Obligation pay the money, but he taketh no acquitance, or if he take one and it happeneth him to leese it, that in that case hee shall bee compelled by the Lawes of England to pay the money againe. And how may it be said then, that that Law standeth with reason and conscience: for as it is grounded upon the Law of Reason, that debts ought of right to bee payed, so it is grounded upon the Law of Reason (as it seemeth) that when they be payed, that hee that payed them should bee discharged. Stu. First thou must understand, that it is not the Law of England, that if a man that is bound in an Obligation pay the money without Acquitance, or if

hee

hee take acquitance and leese it, that therefore the law determineth that hee ought of right to pay the mony eftsones, for that law were both against reason and conscience. But though it is so, that there is a generall Maxime in the law of England, that in an action of debt sued upon an Obligation, the defendant shall not plead that he oweth not the mony, ne can in no wise discharge himselfe in that action, but hee haue acquitance or some other writting sufficient in the Law, or some other thing like, witnessing that he hath paid the money: that is ordained by the Law to auoyd a great inconuenience that els might happen to come to many people: that is to say, that euerie man by a Nude parol, and by a bare Auerrement should auoyd an Obligation. Wherefore to auoyd that inconuenience, the Law hath ordained, that as the defendant is charged by a sufficient writing, that so hee must bee discharged by sufficient writing, or by some other thing of as high authoritie as the Obligation is. And though it may follow thereupon, that in some particuler case a man by occasion of that generall Maxime may bee compelled to pay the money againe that hee paid before: Yet neuertheless, no default can be thereof assigned in the Law. For like as makers of Law take heed to such things as may oft fall, & do much hurt among the people, rather than to particular cases: So in likewise the generall grounds of the law of England, heed more what is good for many, than what is good for one singuler person onely. And because it should bee a hurt to many,

if

if an Obligation should bee so lightly auoided by wozd, therefoze the Law specially pzeuenteth that hurt vnder such maner as befoze appeareth: and yet intendeth not, noz commandeth not, that the money of right ought to bee paid againe, but setteth a generall rule which is good and necessarie to all the people, & that euery man may well kepe without it be throgh his owne default. And if such default happen in any person, whereby he is without remedie at the common law, yet hee may bee holpen by a Subpena, and so hee may in many other cases where conscience serueth foz him, that were too long to rehearse now.

Do. But I pzay thee shew mee vnder what maner a man may be holpen by cõscience. And whether he shall be holpen in the same court, oz in another. St. Because it cannot bee well declared where a man shall bee holpen by conscience, & where not, but it be first knowne what conscience is, therefoze because it pertaineth to thee most pzoperly, to treat of the nature and qualitie of conscience, therfoze I pzay thee that thou wilt make mee some bzefe declaration of the nature and qualitie of conscience, & then I shall answer to thy question as well as I can. Do. I will with good will do as thou saiest, and to the intent that thou maiest the better vnderstand that I shall say of conscience, I shall first shew thee what Synderesis is, and then what reason is, and then what conscience is; and how these three differ among themselues, I shall somewhat touch.

¶ What

¶ What Sindereſis is.

Cap. 13.

Sindereſis is a natural power of the ſoule, ſet in the higheſt part thereof, moving and ſtirring it to good, & abhorring euill. And therfore Sindereſis neuer ſinneth nor erreth. And this Sindereſis our Lord put in man to the intent that the order of things ſhould bee obſerued. For, after Saint Dioniſe, the wiſedome of God ioineth the beginning of the ſecõ things to the laſt of the firſt things: for Angell is of a nature to vnderſtand without ſearching of reaſon, and to that nature man is ioined to Sindereſis, the which Sindereſis may not wholly be extincted neither in man, ne yet in damned ſoules. But neuertheleſſe, as to the vſe and exercise thereof, it may bee let for a time, either through the darkeneſſe of ignorance, or for vndiſcreet delectation, or for the hardneſſe of obſtinacie. First by the darkeneſſe of ignorance Sindereſis may be let, that it ſhall not murmure againſt euill, becauſe hee beleeueth euill to bee good, as it is in heretikes, the which, whē they die for the wickedneſſe of their error, beleeue that they die for the verie trueth of the faith. And by vndiſcreet delectation, Sindereſis is ſometime ſo ouerlaid, that remorſe or grudge of conſcience for that time can haue no place. For the hardnes of obſtinacy Sindereſis is alſo let that it may not ſtirre to goodneſſe, as it is in damned ſoules that bee ſo obſtinate in euill,

that

that they may neuer be inclined to good. And though Sinderesis may be said to that point extinct in damned soules, yet it may not bee said that it is fully extinct to all intents. For they alway murmure against the euill of the paine that they suffer for sinne, and so it may not bee said that it is vniuersally, and to all intents, and to all times extinct. And this Sinderesis is the beginning of all things that may bee learned by speculation or studie, and ministreth the generall grounds and pzinciples thereof: and also of all things that are to be done by man. An example of such things as may be learned by speculation appeareth thus: Sinderesis saith that euerie whole thing is more than any one part of the same thing, & that is a sure ground that neuer faileth. And an example of things that are to be done, or not to be done: as where Sinderesis saieth no euill is to be done, but that goodnesse is to be done and followed, and euill to be fled, and such other.

And therefore Sinderesis is called by some men, the Law of reason, for it ministreth the pzinciples of the law of reason, the which be in euery man by nature, in that he is a reasonable creature.

Of Reason.

Cap. 14.

When the first man Adam was created, hee receiued of God a double eye, that is to

to say, an outward eye, whereby hee might see visible things, and know his bodily enemies and eschew them. And an inward eye that is the eye of reason, whereby hee might see his spirituall enemies that fight against his soule and beware of them. And among all gifts that God gaue to man, this gift of reason is the most noblest, for thereby man precelleth all beasts, and is made like to the dignitie of Angels, discerning troth from falshood, and euill from good. Wherefore hee goeth farre from the effect that he was made to, when he taketh not heed to the trueth, or when hee preferreth euill before good.

And therefore after Doctors, reason is the power of the soule, that discerneth betweene good and euill, and betweene good and better, comparing the other: the which also sheweth vertues, loueth good, and flyeth vices. And reason is called righteous and good, for it is conformable to the will of GOD, and that the first thing, and the first rule that all things must be ruled by. And reason that is not righteous nor straight, but that is said culpable, is either because she is deceiued with an Errour that might bee ouercome, or else through her pride or slothfulnesse shee enquireth not for knowledge of the trueth that ought to bee enquired. Also reason is diuided into two parts, that is to say, into the higher part and into the lower part.

The higher part hideth heauenly things & eternall, and reasoneth by heauenly Lawes or by heauenly reason what is to be done, & what is

is not to bee done, and what things God commaundeth, and what he prohibiteth. And this higher part of reason hath no regard to transitory things or temporall things, but that sometime as it were by maner of counsell, she bringeth forth heauenly reasons to order well temporall things. The lower part of reason worketh most to gouerne well tẽporall things, and she groundeth her reasons much vpon lawes of men, & vpon reason of man, whereby she concludeth that that is to bee done, that is honest and expedient to the commonwealth, or not to bee done, that is not expedient to the Commonwealth. And so that reason whereby I know God and such things as pertaine to God, belongeth to the highest part of reason. And the reason whereby I know creatures, belongeth to the lower part of reason. And though these two parts, that is to say, the higher part & the lower part be one in deed & essence, yet they differ by reason of their working, and of their office, as it is of one selfe eye, that sometime looketh vpward, and sometime downeward.

¶ Of Conscience.

Cap. 15.

THis word Conscience, which in latine is called cõscientia, is compounded of this præpositiõ cũ, ỹ is to say in English, with & of this nowne scientia, that is to say in English, knowledge, and so conscience is almuch to say, as knowledge of one thing with another thing, & conscience so taken, is nothing els but

an applying of any scīēce or knowledg to some particular act of man. And so conscience may sometime erre, & sometime not erre. And of conscience thus take, doctors make many descriptions, whereof one doctor saieth, that conscience is the law of our understanding. Another, that conscience is an habit of the mind discerning betweene good & euill. Another, ỳ conscience is the iudgement of reason, iudging on the particular acts of mā: al which sayings agree in one effect (that is to say) ỳ conscience is an actuall applying of any cunning or knowledge to such things as be to be done, whereupon it followeth, that vpō the most perfit knowledge of any law or cunning, & of the most perfit & most true applying of the same to any particular act of man followeth ỳ most perfit, ỳ most pure, & the most best conscience. And if there be default in knowing of the trueth of such a law, or in the applying of ỳ same to particular acts, thē thereupō followeth an error or default in cōscience, as it may appear by this exāple. Sinderesis ministreth a vniuersall principle ỳ neuer erreth, (that is to say) ỳ an vnlawfull thing is not to be done. And thē it might be taken by some mā that euery oath is vnlawful, because the Lord saith, Mat. 5. Ye shal in no wise sweare: and yet he ỳ by reason of the said words will hold that it is not lawfull in no case to sweare erreth in conscīēce, for he hath not the perfit knowledge and understanding of the truth of the said gospel, nor he reduceth not the saying of scripture to other scriptures, in which it is granted that in some case an oath may be lawful, & the cause

why

why conscience may so erre in the said case, & in other like, is because conscience is formed of a certain proposition or question grounded particularly upon vniuersall rules ordained for such things as are to be done. And because a particuler proposition is not knowne to himself, but must appeare & be searched by a diligent search of a reason, therfore in search & in the cõscience þ should be formed thereupon may happen to be erroꝛ, & thereupon it is said þ there is erroꝛ in conscience: which erroꝛ cõmeth either because he doth not assent to that he ought to assẽt vnto or else because his reason whereby he doth refer one thing to another, is deceiued. For further declaratiõ wherof it is to vnderstand that erroꝛ in cõscience commeth 7. maner of wayes. First is through ignorance: & þ is when man knoweth not what he ought to doe, and then he ought to aske counsel of thẽ þ he thinketh most expert in that sciẽce, wherupõ his doubt resteth. And if he can haue no coũsel, thẽ he must wholy cõmit him to God, & he of his goodnes will so order him, that he will saue him frõ offẽce. The second is through negligẽce, as when a man is negligent to search his owne conscience, or to enquire the trueth of other. The 3. is through pride, as when he will not meeken himselfe, ne beleeue them that be better & wiser than hee is. The fourth is through singularity, as when a man followeth his owne wit, and will not conforme himselfe to other, nor follow the good common wayes of men. The fift is thorough an inordinat affection to himselfe, wherby hee maketh conscience to follow his desire,

and so he causeth her go out of her right course. The 6. is through pusillanimitie, whereby some person dredeth oft times such things as of reason hee ought not to dread. The 7. is through perplexity, & this is when a mã beleeueth himself to be so set betwixt two sins, that he thinketh it vnpossible, but that he shall fall into the one, but a mã can neuer be so perplexed in deed but through an error in conscience, & if he will put away that error he shall be deliuered: therefore I pray thee that thou wilt alwaies haue a good conscience, and if thou haue so, thou shalt alwaies be merry, & if thine own heart reproue thee not, thou shalt alwaies haue inward peace. The gladnes of rightwise men is of God & in God, & their ioy is alwaies in truth and goodnes. There be many diuersities of conscience, but there is none better than that, whereby a man truly knoweth himself. Many men know many great & high cũning things, & yet know not themselues, and truly he that knoweth not himselfe knoweth nothing well. Also he hath a good & cleane conscience, that hath puritie and cleanes in his heart, truth in his word, & rightwisenes in his deed. And as a light is set in a lantern that all that is in the house may be seen thereby, so almightie God hath set cõscience in the midst of euerie reasonable soule as a light wherby he may discern & know what he ought to do, & what he ought not to do. Therefore for asmuch as it behoueth thee to bee occupied in such things as pertain to the law: It is necessarie that thou euer hold a pure & clean conscience, specially in such things as cõcern restitution:

tion: for the sin is not forgiuen but if the thing that is wrongfully taken be restored. And I counsel thee also that thou loue that is good & flye that is euill, & that thou doe to another as thou wouldest should be done to thee, & that thou doe nothing to other that thou wouldest not should be done to thee: That thou doe nothing against truth, that thou liue peaceably with thy neighbor, and that thou do Iustice to euery man as much as in thee is. And also that in euerie generall rule of the law, thou doe obserue & keepe equitie: & if thou doe thus, I trust the light of the lanterne, that is thy conscience, shall neuer be extincted, &c. But I pray thee shew me what is that equitie that thou hast spoken of before & that thou wouldst that I should keepe. Do. I will with good will shewe thee somewhat therof.

¶ What is Equitie.

Cap. 16.

EQuitie is a rightwisenes that considereth all the particular circūstances of the deed, the which also is tēpered with the sweetnesse of mercie. And such an equitie must alwaies be obserued in euerie law of man, & euerie generall rule thereof, & that knew he wel, that said thus, laws couet to be ruled by equitie. And the wise man saith, be not ouermuch rightwise: for the extreme rightwisenes is extreme wrong, as who saith, if thou take al that the words of the law giueth thee, thou shalt sometime do against the law: & for the plainer declaration what equitie is, thou shalt vnderstand,

that fith ỹ déds & acts of men, for which laws bin ordained, happē in diuers maners infinitly It is not possible to make any generall rule of the law, but that it shal faile in some case & therfore makers of laws take heed to such things as may often come, & not to every particuler case, for they could not though they would. And therfore to follow the words of the law were in some case both against iustice & ỹ cōmon welth. Wherefore in some cases it is necessary to leaue the words of the law, & to follow that reason & iustice requireth, & to that intent equity is ordained: that is to say, to temper & mitigate the rigor of the Law. And it is called also by some men Epicaia, the which is no other thing but an exception of the law of God or of the law of reason frō the general rules of the law of man, when they by reason of their generalty would in any particuler case iudge against the law of God, or the law of reason, the which exception is secretly vnderstood in euery general rule of euery positiue law. And so it appeareth that equity taketh not away the verie right, but only that that seemeth to bee right by the generall words of the law: nor it is not ordained against the cruelnes of the law, for the law in such case generally taken is good in himselfe, but equity followeth the law in all particuler cases where right and Iustice requireth, notwithstanding the generall rule of the law be to the contrary: wherefore it appeareth that if any law were made by a mā without any such exceptiō expres sed or implied, it were manifestly vnreasonable & were not to be suffered: for such cases might

come

come that he that would obserue the law should breake both the law of God, & the law of reason. As if a man make a vow that he will neuer eat whitemeat, and after it happeneth him to come there where he can get no other meat. In this case it behoueth him to breake his auow for the particular case is excepted secretly frō his generall auow by his equitie or Epicay, as it is said before. Also if a law were made in a citie, that no man vnder the paine of death should open the gates of the citie before the Sunne rising: yet if the citizens before that houre spring from their enemies come to the gates of the citie, & one for fauing of the citizens openeth the gates before the houre appointed by ỹ law, yet he offendeth not the law, for that case is excepted from the said generall law by equitie, as is said before: & so it appeareth that equity rather followeth the intent of the law, thā the words of the law. And I suppose that there be in likewise sōe like equities grounded vpō the generall rules of ỹ law of the realm. S. Verily, whereof one is this, there is a generall prohibition in the lawes of Englād, that it shal not be lawful to any mā to enter into the freehold of another without authoritie of the owner or the Law: but yet it is excepted frō the said prohibitiō by the law of reason, that if a man driue beasts by the high way, & the beasts happen to escape into the corne of his neighbour, & he to bring out his beasts that they should doe no hurt, goeth into the ground, & fetteth out his beasts, there he shall iustifie that entrie into the ground by the Law. Also notwithstanding the Statute

of Ed. 3. made the 14. yere of his raigne, whereby it is ordained, that no man vpon pain of imprisonment should giue any almes to any valiant begger, that is well able to labour: yet if a man meete with a valiant begger in so cold a weather and so light apparrell, ỹ if he haue no clothes he shal not be able to come to any towne to haue succour, but is likely rather to dye by the way, & he therefore giueth him apparrell to saue his life, he shall be excused by the said statute, by such an exception of the law of reason as I haue spoken of. Do. I know well that as thou saist he shal be excepted of the said statute by conscience, & ouer that, ỹ he shall haue great reward of God for his good deed, but I would wit whether the party shal be so discharged in the cõmon law, by such an exception of the law of reason, or not, for though ignorance vnuincible of a statut excuse the party against God, yet (as I haue heard) it excuseth not in the lawes of the realme, ne yet Chancery, as some say, although the case bee so that the party to whom the forfeiture is giuen may not with conscience leaue it. St Mercly, by thy question thou hast put me in a great doubt, wherfore I pray thee giue me a respite therin to make thee an answere, but as I suppose for ỹ time (howbeit I will not fully affirme it to bee as I say) it should seeme that hee should well plead it for his discharge at the common Law, because it shall be taken that it was the intent of the makers of the statute to except such cases. And ỹ Iudges may many times iudge after the mind of the makers as farre as the letter may suffer

and

and so it seemeth they may in this case. And diuers other exceptions there be also from other generall grounds of the Law of the realme by such equitie, as thou hast remembred before, that were too long to rehearse now. Do. But yet I pray thee shew me shortly somwhat more of thy mind vnder what manner a man may be holpen in this realme by such equitie. St. I will with good will shew thee somewhat therein.

¶ In what manner a man shall be holpen by equitie in the Laws of England.

Cap. 17.

FIrst it is to be vnderstood, there bee in many cases diuers exceptions frō the generall grounds of the law of the Realme by other reasonable grounds of the same law, whereby a man shall be holpen in the common law. As it is of this generall ground, that it is not lawfull for any man to enter vpon a Descent, yet the reasonablenes of the Law excepteth from the ground, an infant that hath right, and hath suffered such a Descent, & him also that maketh continuall claime, and suffereth them to enter, notwithstanding ꝑ descent. And of that exception they shal haue aduantage in ꝑ cōmon law. And so it is likewise of diuers Statuts, as of the statute whereby it is prohibited, ꝑ certaine particular tenāts shal do no waste, yet if a lease for terme of yeres be made to an infant that is within yeres of discretion, as of the age of .x. or .xij. yeres, & a stranger do waste, in this case this in-

infant shall not be punished for the wast, for he is excepted & excused by the law of reason. And a woman couert to whom such a lease is made after the couerture, shall bee also discharged of wast after her husbands death, by a reasonable maxime and custome of the realm. And also for reparations to be made vpon the same ground it is lawfull for such particular tenants to cut downe trees vpon the same ground to make reparations. But the cause there as I suppose is, for that the mind of the makers of the said statute, shalbe taken to be, that that case should be excepted. And in all these cases the parties shalbe holpē in the same court, & by the cōmon law: & thus it appeareth that sometime a man may be excepted from the rigor of a maxime of the law by another maxime of the Law. And sometime from the rigor of a statute by the law of reason, & sometime by the intent of the makers of the stat. but yet it is to bee vnderstood that most commonly, where any thing is excepted from the generall customs or Maxines of the lawes of the Realme by the law of reason, the party must haue his remedy by a writ that is called Subpena, if a subpena lye in the case. But where a Subpena lyeth, & where not, it is not our intent to treat of at this time. And in some case there is no remedy for such an equity by way of compulsion, but all remedie therein must be cōmitted to the conscience of the party. Doct. But in case where a Subpena lyeth, to whom shall it be directed, whether to ỹ Judge, or the party. St. It shall neuer be directed to the Judge, but to the party plaintife or to his At-

turney,

tourney, and thereupon an Iniunction commaunding them by the same vnder a certaine paine therin to be contained, that he proceed no further at the common Law, till it be determined in the Kings Chauncerie, whether the plaintife hath title in conscience to recouer, or not. And when the plaintife by reason of such an Iniunction ceaseth to aske any further proceese. The Iudges will in likewise cease to make any further proceese in that behalfe.

Do. Is there any mention made in the law of England of any such equities. Stu Of this terme equitie, to the intent that is spoken of heere, there is no mention made in the Law of England, but of an Equity derined vpon certaine statutes, mention is made many times & often in the Law of England: But that equity is all of another effect thā this. But of the effect of this Equity that we now speake of, mention is made many times: for it is oftimes argued in the Law of England, where a Subpena lieth, and where not, and daily Bils bee made by men learned in the Lawe of this Realme, to haue Subpenas. And it is not prohibited by the Law, but that they may well doe it, so that they make them not, but in case where they ought to be made, and not for veration of the partie, but according to the truth of the matter. And the Law will in many cases that there shall be such remedie in the Chauncerie vpon diuers things grounded vpon such Equities, and then the Lord Chauncellour must order his conscience after the rules and grounds of the Law of the realme.

tu-

in so much that it had not bene inconuenient to haue assigned such remedie in the Chancerie vpō such equities for the seuenth ground of the Law of England: but forasmuch as no record remaineth in the kings Court of no such Bill, ne of the writ of Subpena or Iniunction, that is fined thereupon, therefore it is not set as for a speciall ground of the law, but as a thing that is suffered by the law. D. Then sith the parties ought of right in many cases to bee holpen in the Chaunceric vpon such equities: it seemeth that if it were ordained by statute, that there should be no remedie vpon such equities in the Chaunceric, nor in none other place, but that euerie matter should bee ordered onely by the rules and grounds of the common Law, that the Statute were against right & conscience. St. I thinke the same, but I suppose there is no such statute. Do. There is a statute of that effect, as I haue heard say, wherein I would gladly heare thy opinion. Stu. Shew me that statute and I shall with good will say as me thinketh therein.

¶ Whether the Statute hereafter rehearsed by the Doctor, be against conscience. or not.

Cap. 18.

There is a Stat. made in the 4. yere of K. H. 4. c. 22. whereby it is enacted that iudgment giuen by the kings courts, shall not be examined in the Chancery, Parliament, nor

nor elsewhere, by which Statute it appeareth that if any Iudgement bee giuen in the Kings courts against an equity or against any matter of conscience, that there can be had no remedie by that equity, for the iudgement cannot be reformed without examination, and the examination is by the said Statute prohibited, wherefore it seemeth that the said Statute is against conscience: what is thine opinion therein?

St. If iudgement giuen in the Kings courts should be examined in the Chancery before the Kings Councell, or any other place, the plaintifes or demaundants should seldome come to the effect of their suit, ne the law should neuer haue end. And therefore to eschew that inconuenience that Statute was made. And though paraduenture by reason of that Stat. some singuler person may happen to haue losse: Neuertheless the said Statute is verie necessarie, to eschew many great vexations and vniust expences, that would else come to many plaintifes that haue rightwisely recouered in the Kings Courts. And it is much more prouided for in the law of England that hurt nor damages should not come to many, than only to one. And also the said Statute doth not prohibit equitie, but it prohibiteth onely the examination of the iudgement for the eschewing of the inconuenience before rehearsed. And it seemeth that the said Statute standeth with good conscience: & in many other cases where a man doth wrong yet he shal not be cõpelled by way of compulsion to reforme it, for many times it must be left to the conscience of the party, whether he will re-

dresse

dresse it or not. And in such case hee is in conscience as well bound to redresse it if he will saue his soule, as hee were if hee were compellable thereto by the law, as it may appeare in diuers cases that may bee put vpon the same ground. Doct. I pray thee put some of these cases for an example. Stu If the defendant wage his law in an action of debt brought vpon a true debt, the plaintife hath no meanes to come to his det by way of compulsion, neither by Sub pena, nor otherwise, yet the defendant is bound in conscience to pay him. Also if the grand Iurie in attaint affirme a false verdict giuen by the petie Iurie, there is no further remedie but the Conscience of the partie. Also where there can bee had no sufficient proofe, there can bee no remedie in the Chancerie, no more than there may bee in the spirituall Court. And because thou hast giuen an occasion to speake of conscience I would gladly heare thy opinion where conscience shall be ruled after the law, & where the law shal be ruled after conscience. D. And of that matter I would likewise gladly heare thy opinion, specially in cases grounded vpon the lawes of England, for I haue not heard but little thereof in time past: but before thou put any case thereof, I would that thou wouldest shew me how these two questions after thy opinion are to be vnderstood.

¶ Of what Law this question is to bee vnderstood: that is to say, where conscience shall be ruled after the Law.

Cap. 19.

The

The law wherof mention is made in this question, that is to say, where conscience shal be ruled by the law, is not as me seemeth to be vnderstood only of the law of reaſō, & of the law of God, but also of the law of mā, ỹ is not contrarie to the law of Reason, nor the law of God, but that it is superadded vnto thē for the better ordering of the commonwealth: for such a law of man is alwaies to be set as a rule in conscience, so that it is not lawfull for a man to farme it on the one side, ne on thother, for such a law of man hath not only the strēgth of mans law, but also the Law of Reason, or of the Law of God, whereof it is derived: for Lawes made by man, which haue receiued of God power to make Lawes, be made by God. And therfore conscience must be ordred by the law, as it must be vpon the law of God, & vpō the law of reason. And furthermore the Law wherof mētion is made in the later end of the Chapter next before, that is to say, in the question wherein it is asked where the law is to be left & forsaken for cōscience, is not to be vnderstood of the law of reaſon, nor of the law of God: for the two lawes may not be left, nor it is not to be vnderstood of the law of man, that is made in particular caſes, and that is consonant to the law of reaſon, & to the law of God, and that yet that law should bee left for conscience: for of such a law made by man, conscience must be ruled, as it is said before: nor it is not to be vnderstood of a law made by mā cōmanding or prohibiting any thing to bee done that is against the law of reaſon, or the law of God.

For

For if any law made by him, bind any person to any thing that is against the said laws, it is no law, but a corruption and manifest errour. Therefore after them that be learned in ȳ laws of England, the said question, that is to say, where the law is to be left for conscience, and where not, it is to be understood in diuers maners, and after diuers rules, as hereafter shall somewhat be touched.

First, many vnlearned persons beleeue that it is lawfull for them to do with good conscience all things, which if they do them, they shall not be punished therefore by the Law, though the law doth not warrant them to do that they do, but onely when it is done, doth not for some reasonable consideration punish thē that doth it, but leaueth it onely to his conscience. And therefore many persons doe oft times that they should not do, and keep as their owne that that in conscience they ought to restore. Wherefore there is the laws of England in this case.

If two men haue a wood iointly, & the one of them felleth the wood, and keepeth all the money wholly to himselfe: In this case his fellow shall haue no remedy against him by law, for as they when they tooke the wood iointly, put each other in trust, and were content to occupie together: so the Law suffereth them to order the profites thereof according to the trust that each of them put thother in. And yet if one take all the profits, hee is bound in conscience to restore the halfe to his fellow, for, as the Law giueth him right only to halfe the land, so it giueth him right onely in conscience

science to the halfe profits. And yet neuerthe-
lesse it cannot bee said in that case, that the law
is against conscience, for the law neither wil-
leth ne commandeth that one should take all the
profits, but leaueth it to theire conscience: so
that no default can be found in the law, but in
him that taketh all the profits to himselfe may
bee alligned default, which is bound in consci-
ence to reforme it, if he wil saue his soule, though
he cannot be compelled thereto by the law. And
therefore in this case & other like, that opinion
which some haue, that they may do with consci-
ence, all that they shall not bee punished for by
the law if they doe it, it is to bee left for consci-
ence: but the Law is not to bee left for consci-
ence.

Also many men think that if a man haue land
that another hath title to, if he y hath the right
shall not by the action that is giuen him by the
law to recouer his right by, recouer damages,
that then hee that hath the land is also discharg-
ed of damages in conscience, & that is a great
error in conscience: for though he cannot be cō-
pelled to yeeld the damages by no mans Law,
yet hee is compelled thereto by the law of rea-
son, & by the law of God, whereby we be bound
to doe as wee would bee done to, and that wee
should not couet our neighbors goods: & there-
fore if tenant in taile be disseised and the disses-
for dyeth seised, and then the heire in the taile
bringeth a Formedō & recouereth the land & no
damages, for the law giueth him no damage in
that case, yet the tenant by conscience is bound
to yeeld damages to the heire in taile from the

death of his auncestor. Also it is taken by some men, that the law must bee left for conscience, where the law doth not suffer a man to deme ℔ he hath before affirmed in Court of Record, or for that he hath wilfully excluded himself thereof for some other cause: as if the daughter that is only heire to her father, will sue livery with her sister that is a bastard, in that case she shall not after be received to say, that her sister is a bastard, in so much that if her sister take halfe the land with her, there is no remedie against her by the law. And no more there is of diuersitie in other estopples, which were too long to rehearse now. And yet the party that may take aduãtage by such an estopple by ℔ law is bound in conscience to forsake that aduantage, specially if hee were to estopped by ignorance, & not by his owne knowledge & assent. For though the law in such cases giueth no remedy to him that is estopped, yet the law iudgeth not that the other hath right vnto the thing that is in variance betwixt them. And it is to be vnderstood that ℔ law is to be left for cõscience, where a thing is tried and found by verdict against the truth, for in the common law the iudgement must bee giuen according as it is pleaded and tried, like as it is in other laws, that the iudgement must be giuen according to that, that is pleaded and proued. And it is to be vnderstood that the law is to be left for conscience, where the cause of the law doth cease, for when the cause of the Law doth cease, the Law also doth cease in conscience, as appeareth by this case hereafter following.

A man maketh a lease for term of life, after a stranger doth waste, where for the lessee bringeth an action of Tresp as, & hath iudgement to recouer damages, hauing regard to the treble damages that he shall yeld to him in the reuersion. And after he in the reuersion before action of waste sued, dieth, so that the action of waste is thereby extinced: then the tenant for terme of life (though hee may sue execution of the said iudgement by the law) yet he may not doe it by conscience, for in conscience hee may take no more thā he is hurted by the said Tresp as, because he is not charged ouer with treble damages to his lessor. Also it is to be vnderstood where a law is grounded vpon a presumption, if the presumption be vntrue, then the Law is not to be holden in cōscience. And now I haue shewed thee somewhat of the question, that is to say, where the law shalbe ruled after conscience, I pray thee shew mee whether there be not like diuersities in other laws, betwixt law & conscience. D. Yes verily, very many, whereof thou hast recited one before, where a thing that is vntrue is pleaded, and proued, in which case iudgement must be giuen accoʒding, as well in the law Ciuill, as in law Cannon. And an other case is, that if the heire make not his Inuentoʒy, he shall bee bound after the law Ciuill to all the debts, though the goods amount not to so much: And the law Cannon is not against that Law, and yet in conscience the heyre which in the Lawes of England is called an Executour is not in that case charged to the debts, but accoʒding to the value of the goods.

And now I pray thee shew mee some cases where conscience shall be ruled after the Law, &c. I will with good will shew thee somewhat as me thinketh therein.

¶ Here follw diuers cases, where conscience is to be ordered after the Law.

Cap. 20.

The eldest sonne shall haue & enioy his fathers lands at the common law in conscience, as he shall in the law. And in Burgh-english the younger sonne shall inioy the inheritance, & that in conscience. And in Gauelkind all the soones shall inherit the land together as daughters, at the cõmon law & that in conscience And there cã be none other cause assigned why cõscience in the first case is with the eldest brother, & in the second with the younger brother, & in the 3. case with all the brethren, but because the law of England by reasõ of diuers customs doth sometime giue the land wholy to the eldest sonne, sometime to the yongest, & sometime to all. Also if a man of his meere motion make a feoffement of two acres of lãd lying in two seuerall shires, & maketh liuery of seisin in the one acre in the name of both. In this case the feoffee hath right but onely in the acre whereof liuerie of seisin was made, because hee hath no title by the Law: but if both acres had bin in one shire he had had good right to both. And in these cases the diuersitie of the law maketh the diuersitie of conscience.

Also

Also, if a mā of his meer motiō make a feffement of a Manor, & saith not, to haue & to hold &c. with the appurtenances, in that case the feffee hath right to the demeine Lands, and to the rents, if there be attornements, & to the commō pertaining to the Manno, but hee hath neither right to the aduowsōs appendāt, if any be, nor to the villeines regardant: but if this term, with thappurtenances, had bin in the deed, the feoffee had right in conscience aswell to the aduowsons and villeines, as to the residue of the Manor: but if the king of his meer motiō giue a Manor with thappurtenances, yet the donee hath neither right in law nor conscience to the aduowsons nor villeines. And the diuersitie of the Law in these cases make the diuersitie of conscience.

Also, if a man make a lease for terme of yeres reciding to him & to his heirs a certain rēt vpon condition, that if the rent bee behind by xl. dates &c. that then it shalbe lawful to the lessor & his heires to reenter. And after the rent is behind, the lessor asketh the rent according to the law, & it is not payed, the lessor dieth, his heire entreth. In this case his entrie is lawfull both in law and conscience: but if the lessor had died before he had demanded the rent, and his heire demanded the rent, & because it is not paied hee reentreth, in that case his reentrie is not lawfull neither in law nor conscience.

Also, if the tenāt in dower sow herland & dy before the corne is ripe, the corne in conscience belongeth to her executors, & not to him in the reuersiō: but otherwise it is in conscience of

graſſe and fruits. And the diuerſitie of the law maketh there alſo the diuerſitie in conſcience

Alſo, if a man ſeiſed of lands in his demeſne as of fee, bequeath the ſame by his laſt will to another, & to his heires, & dieth: In this caſe the heire notwithſtanding the will, hath right to the land in conſcience. And the reaſon is becauſe the law iudgeth that will to be void, & as it is void in the law, ſo it is void in conſcience.

Alſo, if a man grant a rent for terme of life, & make a leaſe of land to the ſame grātee for terme of life, & the tenant alieneth both in fee: In this caſe hee in the reuerſion hath good title to the land both in law and conſcience, and not to the rent. And the reaſon is, becauſe the land by the Alienation is forfeit by the law to him in the reuerſion, and not the rent.

Alſo, if lands be giuen to two men and to a woman in fee, & after one of the men entermarieth with the woman, and alieneth the land & dyeth: In this caſe the woman hath right but onely to the third part, but if the man & the woman had beene maried together, before the firſt feoffement, then the woman notwithſtanding the alienation of her huſband, ſhould haue had right in law & conſcience to the one halfe of the land. And ſo in theſe two caſes conſcience doth follow the Law of the Realme. Alſo if a man haue two ſonnes, one before eſpouſels, and an other after eſpouſels, and after the father dieth ſeiſed of certain lands: In this caſe the ponger ſonne ſhall enioy the lands in this Realme, as heire to his father both in law and conſcience. And the cauſe is, becauſe that ſome bodie after eſpou-

espousels, is by the law of this realme the eerie heire, and the elder son is a bastard. And of these cases and many other like in the lawes of England may be formed the Silogisme of conscience, or the true iudgement of conscience in this maner. Sinderisis ministreth the Maior thus: right wilenes is to be done to euery mā, vpon which Maior the Law of England ministreth the Minor thus: The inheritance belongeth to the son borne after espousels, & not the son borne before espousels, then conscience maketh the conclusion, & saith, therefore the inheritance is in conscience to be giuen to the son borne after espousels. And so in other cases infinit may be formed by the law of the Silogisme or the right iudgement of conscience: wherfore they that be learned in the law of the realm, say that in euery case, where any law is ordained for ꝑ disposition of lands & goods, which is not against the law of God, nor yet against the law of reason, that the law bindeth all them that be vnder the law of the Court of conscience, that is to say, inwardly in his soule. And therefore it is somewhat to marualle that spirituall men haue not indeuored themselues in time past to haue more knowledge of the kings lawes than they haue done, or that they yet doe: for by the ignorance thereof they be of times ignorant of that that should order them according to right and iustice, as well concerning themselues as other that come to them for Counsaile. And now for as much as I haue answered to thy questions as well as I can: I pray thee that thou wilt shew mee thy opinion in diuers

cases formed vpon the law of England where-in I am in doubt, what is to bee holden therein in conscience. Do. Shew me thy questions, & I will say as me thinketh therein.

¶ The first question of the Student.

Cap. 21.

IF any infant that is of the age of xx. yeares, & hath reason & wisedome to gouerne himselfe selleth his land, & with the mony thereof buyeth other Land of greater value than the first was, and taketh the profits thereof, whether may the infant aske his first land againe in conscience, as he may by the law. D. What thinkest thou in that question? St. Mee seemeth that forasmuch as the Law of England in this article is grounded vpon a presumption, that is to say, that infants commonly afore they be of the age of xxi. yeares be not able to gouern themselues, that yet for as much as that presumption fayleth in this infant, that hee may not in this case with conscience aske the Land againe that hee hath sold to his great aduantage, as before appeareth. D. Is not this sale of the infãt and the settement made thereupon, if any were, voidable in the law? S. Yes verely. Do. And if the profit for haue no right by the bargaine, nor by the settement made thereupon, whereby should hee then haue right thereto as thou thinkest? S. By conscience as me thinketh, for the reason that I haue made before. D. And vpon what Law should that conscience be grounded, that thou

speakest of, for it cannot be granted by the law of the Realme, as thou hast said thy selfe. And mee thinketh that it cannot be grounded upon the Law of God, nor upon the Law of reason, for feoffements nor contracts be not grounded upon neither of those lawes, but upon the law of man. St. After the law of propertie was ordained, the people might not conuenientlie liue together without contracts, & therefore it seemeth that contracts be grounded upon ꝯ Law of reason, or at the least, upon the law that is called Ius gentium. Do. Though contracts bee grounded upon the Law that is called Ius gentium, because they be so necessarie & so generall among all people, yet that proueth not that contracts be grounded upon the Law of reason: for though the law called Ius gentium bee much necessarie for the people, yet it may be changed. And therefore if it were ordained by statute that there should bee no sale of land, ne no contract of goods, and if any were, that it should be void, so that euerie man should continue still seised of his landes and possessed of his goods, the statute were good. And then if a man against that statute sold his Land for a summe of money, yet the seller might lawfully retaine his Land according to the statute. And then he were bound to no more but to repay the money that he receiued with reasonable expences in that behalfe. And so in likewise me thinketh that in this case the infant may with good conscience reenter into his first land: because the contract after the Maximes of the law of the Realme is void, for as I haue heard the

Maximes

Maxims of the law be of as great strength in the Law as statutes. And some thinke that in this case the Infant is bound to no more, but only to repay the money to him that he sold his land vnto, with such reasonable costes & charges as he hath sustained by reason of the same. But if a man sell his lād by a sufficient & lawfull contract, though there lack liuerie of seisin or such other solemnities of the Law, yet the seller is bound in conscience to performe the contract. But in this case the contract is insufficient, and so me thinketh great diuersitie betwixt the cases. Stu. For this time I hold mee contented with thy opinion.

¶ The second question of the Student.

Cap. 22.

IF a man that hath lands for terme of life, bee impanelled vpon an Inquest, & thereupō leeseth issues & dieth, whether may those issues be leuied vpon him in the reuersiō in conscience as they may be by the law? D. If they may bee leuied by the law, what is the cause why thou doest doubt whether they may be leuied by conscience? S. For there is a Maxime in the lawes of England, that where two Titles run together, the eldest Title shall bee preferred And in this case the title of him in the reuersion, is before the title of the forfeiture of the issues. And therefore I doubt somewhat whether they may bee lawfully leuied. Do. By that reason it seemeth thou art in doubt what the law is in this

case,

case, but that must necessarily bee knowne, for else it were in vaine to argue what conscience will therein.S. It is certain that ỹ law is such, & so it is likewise if the husband forfeit issues, and die, those issues shall be levied on the lands of the wife.D. And if the law be such, it seemeth that conscience is so in likewise, for sith it is the law, that for execution of iustice euery man shall be impanelled when need requireth, it seemeth reasonable, that if he will not apeare, that he should haue some punishment for his not apparence, for else the law should be cleerely frustrate in that point. And the paine, as I haue heard, is, that he shall lose issues to the king for his not apparance: wherefore it seemeth not inconuenient nor against cõscience, though the law be, that those issues shall be levied of him in the reuersion, for that the condition was secretly vnderstood in the law, to passe with the lease when the lease was made. And therefore it is for the lessor to beware & to prevent the danger at the making of the lease, or els it shall bee adiudged his owne default. And then this particuler Maxime whereby such issues shall bee levied vpon him in the reuersion, is a particuler exception in the law of England from the generall Maxime that thou hast remembred before, that is to say, ỹ where two titles run together, that the eldest title shall be preferred, & so in this case the generall Maxime in this point shall hold no place, neither in law, nor in cõscience, for by this particuler Maxime ỹ strength of ỹ general Maxime is restrained to euery intent, ỹ is to say, aswell in law as in conscience.

The

¶ The third question of the Student.

Cap 23.

If a Tenant for terme of life, or for terme of yeres, do wast, whereby they be bound by the lawes to yeeld to him in the reuersion treble damages, & so shall forf. the place wasted whether is hee also bound in conscience to pay those damages, & to restore that place wasted immediatly after the wast done, as he is in the single dammages, or that he is not bound thereto till the treble damages, & place wasted, bee recouered in the kings Court. To. Before iudgement giuen in the treble damages & of the place wasted, he is not bound in conscience to pay them, for it is vncertaine what he should pay: But it sufficeth that he bee readie till iudgement be giuen to yeeld damages according to the value of the wast, but after the iudgement giuen, hee is bound in conscience to yeeld the treble dammages, & also the place wasted. And the same law is in all Statutes Penal, that is to say, that no man is bound in conscience to pay the penaltie till it be recouered by the law. S. Whether may he that hath offended against such a Statute penal, defend the action & hinder the iudgement, to the intent hee would not pay the penaltie, but onely single damages. D. If the action bee taken rightfully according to the Statute, and vpon a iust cause, the defendant may in no wise defead the action, vnlesse hee haue a true dilatorie matter to plead, which should bee hurtfull to him if he pleaded not, though he bee

not

not bound to pay the penaltie till it bee recouered,

The fourth question of the Student.

Cap. 24.

IF a man enfeoffe other in certaine land vpon condition, that if he enfeoffe any other, that it shalbe lawful for the feoffor & his heirs to reenter, &c. whether is this condition good in cõscience, though it bee void in the law? D. What is the cause why this condition is voide in the law? St. The cause is this, by the law it is incident to euery state of fee simple, that hee y hath the estate, may lawfully by the law, and by the gift of the feoffor, make a feoffement thereof: And then when the feffor restraineth him after, that hee shall make no feoffement to no man against his owne former graunt, & also against the purtie of the state of a fee simple, the Law iudgeth the condition to be void, but if the condition had beene, that he should not haue enfeoffed such a man, or such a man, that condition had bin good, for yet he might enfeoffe other.

D. Though the said condition be against the effect of the state of a fee simple, & also against the law: nevertheless it is not against the intent that the parties agreed vpon, & that at the time of the liuery And forasmuch as the intent of the parties was, y if the feoffee infeffed any man of the land, that the feoffour should enter, and to that intent the feoffee toke the state and after

after brake the intent, it seemeth that the land in conscience should returne to the feoffor. S. The intent of the parties in the lawes of England is void in many cases, that is to say, if he be not ordred according to the law. And if a man of his meere motion without any recompence, intending to giue lands to another, & to his heires make a deed vnto him, whereby he giueth him those lands, to haue and to hold to him for euer, intending that by the word (for euer) the feffee should haue the land to him and to his heires, in this case his intent is voyd, and the other shall haue the land onely for terme of life. Also if a man giue lands to another, & to his heires for terme of xx. yeares, intending, that if the lessee dye within the terme, that the his heires should enioy the land during the terme: In this case his intent is void, for by the law of the Realm all chattels reall & personal shal go to the executors, & not to the heir. Also if a man giue lands to a man and to his wife, & to the third person, intending that euery of them should take the third part of the land as three common persons should, his intent is voyd, for the husband and the wife, as one person in the law, shal take only the one halfe, & the third person the other halfe: but these cases be alway to be vnderstood wher the said estates bee made without any recompence. And forasmuch as in this principal case the intent of the feoffour is grounded against the Law, and that there is no recompence appointed for the feoffement. mee thinketh that the feoffor hath neither right to the Land by Law or conscience: for if hee should haue it by com-

conscience, that conscience should bee grounded vpon the law of reason, and that it cannot, for conditions bee not grounded vpon the Law of reason, but vpon the maxmes & customs of the realme: & therefore it might be ordained by statute that all conditions made vpon land should be void. And when a condition is void by the Maximes of the Law, it is as fully voide to euery intent, as if it were made void by statut, and so me thinketh that in this case the feoffor hath no right to the land in law nor in conscience. D. I am content thy opinion stand till we shall haue hereafter a better leasure to speake farther in this matter.

¶ The fift question of the Student.

Cap. 25.

If a fine with proclamation bee leuied according to the statute, & no claime made within 5. yeres &c whether is the right of a stranger extincted thereby in conscience, as it is in the law? Do. Vpon what consideration was that statute made? Stu. That the right of lands and tenemēts might be the more certainly knowen, and not to bee so vncertaine as they were before that statute. D. And when any law of man is made for a Common wealth, or for a good peace and quietnesse of the people, or for any inconuenience or hurt to be saued from thē, that law is good, though percase it extinct the right of a stranger, and must be kept in the Court of

for:

conscience: for as it is said before in Ch 4. By lawes rightwisely made by man, it appeareth who hath right to the lands & goods, for whatsoeuer a man hath by such a Law hee hath it rightwisely. And whatsoeuer hee holdeth against such a law he holdeth vnrightwisely: and further more it is said there, all the lawes made by man which bee not contrarie to the Law of God must be obserued and kept, & that in conscience. And he that despiseth thē despiseth God, and he that resisteth th m, resisteth God. Also it is to be vnderstood, that possessions and the right thereof is subiect to the lawes, so that they therefore with a cause reasonable may be translated and altered from one man to another, by the act of the Law. And of this consideration that Law is grounded, that by a contract made in faires and markets, the propertie is altered except the propertie be to the King, so that the buyer pay toll, or do such other things as is accustomed there to be done vpon such contracts, and that the buyer knoweth not the former propertie. And in the law Ciuil there is a like Law, that if a man haue another mans goods with a title three yeares, thinking that he hath right to it, he hath the very right vnto the thing and that was made for a law, to the intent that the propertie and right of things should not be vncertaine, and that variance and strife should not bee among the people. And forasmuch as the said Statute was ordained to giue a certaintie of title in the Lands and Tenements compzised in the fine: It seemeth that that fine extinctcth the title of all other, aswell in con-

conscience as it doth in the Law. And sith I haue aunswered to thy question, I pray thee let me know thy mind in one question concerning tailed lands, and then I will trouble thee no further at this time.

¶ A question made by the Doctor, how certaine recoueries that be vsed in the Kings Courts to defeate tailed land, may stand with conscience.

Cap. 26.

I Haue heard say, ℞ when a man that is seised of lands in the taile, selleth the land. That it is commonly vsed, that he that buyeth the land, shall for his suretie, and for the auoiding of the Taile in that behalfe, cause some of his friends to recouer the said lands against the said tenant in taile: which recouery, as I haue beene credibly enformed, shalbe had in this manner: the demaundants shall suppose in their writ & declaration, that the tenant hath no entry, but by such a stranger as the buyer shal list to name & appoint, where indeed the demaundants neuer had possession thereof, nor yet the said straunger. And thereupon the said tenaunt in taile shall appeare in the court, and by assent of ℞ parties, shall vouch to warrant one that he knoweth well hath nothing to yeeld in value. And the voucher shall appeare, & the demãdãts shall declare against him, and thereupon he shal take a day to emparle at the same terme, and at that day by assent and coupn of the parties, he

shall make default, vpon which default because it is a default in despite of the Court, the demandants shall haue iudgement to recouer against the tenãt in taile, and he ouer in value against the vouchee, and this iudgement and recouerie in value, is taken for a bar of the taile for euer: how may it therefore be taken, that ỹ law standeth with cõscience, that as it seemeth alloweth & fauoureth such fained recouories? St. If the tenant in taile sell the land for a certaine summe of mony as is agreed betwixt thẽ at such a price as is commonly vsed of other lands, and for the surertie of the sale suffereth such a recouerie as is aforesaid, what is the cause that moueth thee to doubt whether the said contract, or ỹ recouery made thereupon, for the surertie of the buyer that hath truely payed his money for the same, should stand with conscience? Do. Two things cause mee to doubt therein, one is for that, that after our Lord had giuen the land of Beheſt to Abraham and to his seede, that is to say, to his children in possession alway to continue, he said to Moses, as it appeareth Leuit. 25. the land shall not bee sold for euer, for it is mine. And then our Lord assigned a certain maner how the land might be redeemed in the yeare of Iubile if it were sold before: and forasmuch as our Lord would that the Land so giuen to Abraham and his children should not be sold for euer, it seemeth that he doth against the ensample of God, that alieneth or selleth the land that is giuen to him and to his children, as lands intailed be giuen. Another cause is this: It appeareth by the

commaundement of God, that thou shalt not couet the house of thy neighbour &c. And if that concupiscence be prohibited, more strōger then the vnlawfull taking and withholding thereof is prohibited: and forasmuch as called Land, when the auncestor is dead, is a thing that of right is belonging to his heire, for that hee is heire according to the gift, how may the land with right or conscience be holden frō him?

S. Notwithstanding the prohibition of Almightie God, whereby the Land that was giuen to Abraham & to his seed might not be alienes for euer, yet lāds within walled townes might lawfully bee alienes for euer, except the Lands of the Leuites, as appeareth in the said Chapter of Leuitic. 25. And so it appeareth that the said Prohibition was not generall for euerie place, and that among the Iewes. And it appeareth also that it was giuen onely to Abraham and his children, and so it was not generally to all people. And it appeareth also that it extended not but onely to the Land of promission, as it appeareth by the wordes of the sayd Chapter, where it is said thus all the region of our possession shall bee sold vnder the condition of redeeming: whereby appeareth that Lands in other Countries bee not bound to that condition, and as they be not bound to that condition, by the same reason it followeth, that they bee not bound to the same succession. Therefore that sayd Law, that will that the Land giuen to Abraham and to his seed shall not be sould for euer,

bindeth no land out of the land of promission, & some men wil say, that sithen the passion of our Lord was promulgate and knowne, bindeth not there. And to the second reason which is grounded vpon the commaundement of God: It must needs be granted that it is not lawfull to any man vnlawfully to couet the house of his neighbour, and that then more stronger he may not vnlawfully take it from him: but then it remaineth for thee yet to proue how in this case this called land that is sold by his auncestor, and whereof a recouerie is had recorded in the kings court, may be said the lands of the heire. D. That may be proued by the law of the Realme, that is to say, by the statute of Westminster the second cap. 1. where it is said thus The will of the giuer expressely contained in the deed of his gift, shal be from henceforth obserued, so that they to whom the tenements bee so giuen, shall not haue power to alien, but that the lands after their death shall remaine to the issue or retourne to the donour, if the issue faile: By the which statute it appeareth euidently that though they to whom the tenements were so giuen, alienen them away, that yet nevertheless they in law and conscience by reason of the said Statute ought to remaine to their heires according to the gift, for it is holden cõmonly by all Doctors that the commaundements and rules of the law of man or of a positiue law that is lawfully made, bind all that be subiects to the law according to the mind of the maker, and that in the Court of conscience.

Stu-

Sr. Doest thou think that if a man offend against a statute penal that he offendeth in conscience? Admit that he do it not of a wilfull disobedience, or that hee will not obey the law, for if hee doe it of disobedience, I thinke he offendeth. D. If it be but onely a Statute that is called Popular, it bindeth not in conscience to the payment of the penaltie, till it be recouered by the law, and then it doth bind in conscience: but if a statute be made principally to remedie the hurt of one partie, & for that hurt it giueth a penaltie to the partie, in that case the offendour of the Statute is bound immediately to restore the damages to the value of the hurt, as it is vpon the stat. of Westm. but the penaltie aboue the hurt hee is not bound to pay till iudgemēt be giuen as it is said before: but Statutes by which it is assigned who shall haue right or propertie to these Lands and Tenements, or to these goods or cattels, if it bee not against the law of God, nor against the law of reason, bind all them that bee subiect to the law, in law and conscience, and such a statute is the statute of West. 2 whereof we haue treated before, wherefore it must be obserued in conscience.

S But some hold that the statute of Westminster the second was made of a singularitie and presumption of many that were at the said Parliament, for exalting and magnifying of their owne blood, and therefore they say that that statute made by such a presumption bindeth not in conscience.

D. It is very perilous to iudge for certaine

that the said Statute was made of such presumption as thou speakest of: for there bee many considerations to proue that the sayde Statute was not made of such presumption, but rather of a verie good mind of all the parliament, or at the least of the more part thereof, & for the common wealth of all the realme: & first in the King the which in the said Parliament was the head, and most chiefe and principall part of the Parliament (as he is in euerie Parliament) cannot be noted to be such intent: for it is not necessary nor it was not then in vse, that lands of the Crowne should be entailed: and in spirituall men, ne yet in certaine Burgesses & Citizens of the said Parliament which at that time had no land, there can be noted no such singularity: nor yet in the Noble men and Gentlemen nor such other as were of the said Parliament and had Lands and tenements. It is not good to iudge in certaine that they did it of such presumpton, but it is good and expedient in this case as it is in other cases that be in doubt, to hold the surer way, & that is, that it was made of charitie, to the intent that hee nor the heires of him to whom the land was giuen should not fall into extreme powertie, and thereby happyly to run into offence against God. And though it were true as they say, that it was not made of charitie but of presumption and singularitie as they speake of: Neuertheleſſe forasmuch as the Statute is not against the Law of God nor against the Law of Reason, it must be obserued by all them that be Subiects vnto that

Law

Law. For as John Gerson in the Treatise that he intitled in latine, De vita spirituali animæ, the fourth lesson, and the third corolary, sayth that God will that makers of Lawes iudge onely of outward things, and reserue secret things to him. And so it appeareth that man may not iudge of the inward intent of the deed, but of such things as bee apparant and certaine, but it is not apparant that there was any such corrupt intent in the makers of the said Statute: how may it therefore be said that that Law is good or rightwise, that not only suffereth such things against the statute, but also against the commaundement of God? Ans. To that some aunswere and say that when the land is sold, and a recouerie is had thereupon in the Kings Court of Record, that it sufficeth to barre the tayle in conscience, for they say, that as the tayle was first ordained by the Law, so they say that by the Law it is annulled againe. Do. Be thou thy selfe Iudge, if in that case there be like authority in the making of the tayle, as there is in the annulling thereof: for it was ordained by authoritie of Parliament, the which is alway taken for the most high Court in this Realme before any other, and it is annulled by a false supposell, for that, that they that bee named demaundaunts should haue right to the land, where in trueth they had neuer right thereto: whereupon followeth a false supposell in the writ, and a false supposell in the declaration, & a voucher to warrant by coyn of such a person as hath nothing to yeeld in vaine, and thereupon by comin

and collusion of the parties followeth the default of the vouchee, by the which default the iudgemēt shalbe giuē. And so all the iudgement is demed & grounded of the vntrue suppose & couin of the parties, whereby the Law of the realme ỹ hath ordained such a writ of Entre to help them that haue right to lands or tenemēts is defrauded, the court is deceiued, the heire is disherited, & as it is to doubt, the buyer and the seller, their heirs & assignes hauing knowledge of the tatle bee bound to restitution, & verily I haue heard many times, that after the Law of the Realme such recoueries should be no barre to the heire in the tatle, if the law of the realme might be therein indifferently heard. S. I cannot see but that after the Law of the realme it is a barre of the tatle, for when the tenant in tatle hath vouched to warranty, & the vouchee hath appeared & entred into the warranty, and after hath made default in despite of the court, whereupon iudgement is giuen for the demaundant against the tenant, & for the tenant that he shal recouer in paine against the vouchee: if the heire in the tatle should after bring his Formedon & recouer the lands entailed, and after the vouchee purchaseth lands, then should the heire also haue execution against him to the paine of the lands entailed, as heire to his ancestor that was tenant in the first action, and so he should haue his own lands, and also the lands recouered in paine: therfore because of the presumption that the vouchee may purchase lands after the iudgement, some be of opinion that it is in the law a good bar of the tatle. D. I suppose

that

that in that case thou hast put, that the bouchee may barre the heire in taile of his recouerie in value, because he hath recouered the fee simple. Nevertheles I will take a respit to be aduised of that recouery in value. And if thou can yet shew me any other consideration why the said recoueries should stand with cõscience, I pray thee let mee heare thy conceit therein, for the multitude of the said recoueries is so great, that it were great pity that all should be bound to restitution that haue lands by such recouveries, sith there is none (as far as I can heare) disposed them to restore. Stu. Some men make another reason to proone that the said recouveries should be sufficient by the law to auoid the statute of West. then and if they bee sufficient therto, they be sufficient in conscience. D. What is their reason therein? S. In the 7. yere of H. 8. ca 4. among other things it is enacted, that all recouerers their heires and assignes, may auow and iustifie for rents, seruices, & customs by them recouered, as they against whom they recouered might haue done. And then they say that when the Parliament gaue to such recouerers authoritie to auow and iustifie for such rents, customes, and seruices, as they recouered, that the intent of the Parliament was, that such recouerers should haue right to that for the which they should auow or iustifie: for els they say that it should bee in vaine to giue them such power, and that the Parliament should else bee taken in maner as fortifiers of wrongfull titles, and so they say that such recouerers by reason of the said Statute haue

right

right by the law. D. That statute as it seemeth was made onely to giue to the recouerers, a forme to auow and iustifie which they had not before, though they had recouered vpon a good title. And the cause why they had no forme to auow or iustifie before the said Statute was, forasmuch as the recouerers did not by the pretence of their action, affirme the possession of him or them against whom they recouered, nor claimed not by them, but rather disaffirmed and destroyed their estate: And therefore they cannot alledge any continuance of their title by them, as they may that haue rents or seruices, or such other of the graunt of other by deed or by fine. And therefore as it seemeth the most principall intent of the statute was, that such recouerers should auow and iustifie for rents, seruices and customs, as they should or might do that had them by fine, or deed: not hauing any respect as it seemeth whether they recouered against tenant in fee simple, or in fee taple, nor whether the recoueries were had vpon a rightfull title. And therefore as me seemeth the said Statut neither affirmeth nor disaffirmeth the title of recouerers, whereby they doe auow: For if a man had right before the recouerie, the right should remaine vnto him notwithstanding the said Statute, and so me seemeth that the title of them that haue the land entapled by such recoueries, is nothing fortified nor affirmed by the sayde statute, but that they are in the same case as they were before, what thinkest thou therin? S. This matter is great, for as thou sayest there bee so many

that

that haue tailed lands by such recoueries, that it were great pitie and heauinesse to condemne so many persons, & to iudge that they all were bound to restitution. For I thinke there bee but few in this realme that haue lands of any notable value, but that they or their ancestors, or some other by whom they claime, haue had part therof by such recoueries. Insomuch that Lords Spirituall and Temporall, Knights, Squires, rich men and poore, Monasteries, Colledges and Hospitals haue such land, for such recoueries haue beene vsed of long time: who may thinke therefore without great heauinesse, that so many men should bee bound to restitution, and that yet as thou saiest, no man disposeth him to make restitution. And so I am in manner perplexed and wot not what to say in this case, but that yet I trust that ignorance may excuse many persons in this behalf.

Doct. Ignorance of the deed may excuse but ignorance of the Law excuseth not, but it bee inuincible, that is to say, that they haue done that in them is to know the trueth: as to counsaile with learned men, and to aske them what the Law is in that behalfe, and if they answer them, that they may do this or that lawfully, then they be therby excused in conscience. But yet in mans Law they be not therby discharged, but they that haue taken vpon them to haue knowledge of the Law, be not excused by ignorance of the Law, ne no more are they that haue a wilfull ignorance, and that would rather bee ignorant than to know the trueth. And therefore they will not dispose them to aske

eske any Counsaile in it, and if it be of a thing that is against the Law of God, or the law of reason, no man shall bee excused of ignorance, and so there bee but few that bee excused by ignorance. S. What then, shall wee condemne so many and so notable men? D. Wee shall not condemne them, but wee shall giue them their perill. S. Yet I trust their daunger is not so great that they should be bound to restitution: For Iohn Gerson saith in his said booke called, De vnitate Ecclesiastica, cõsideratione secunda, Quod communis error facit ius: that is to say, A common errour maketh a right, of which words as it seemeth sometrust may be had, that though it were fully admitted the said recoueries were first had vpon an vnlawfull grouñd and against the good order of conscience, that yet neuertheleſſe, for asmuch as they haue been vsed of long time, so that they haue bin taken of diuers men that haue been right well learned, in maner as for a law, that the buyers partly be excused, so that they bee not bound to restitution. And moreouer, it is certaine that the Statute of Westminster the second, nor none other statute made by man cannot be of greater value or strength, than was the bond of matrimony that was ordained of God. And though that bond of Matrimonie was indissoluable, yet neuertheleſſe Moses suffered a bil of refusal of the Iewes, which in Latin is called Libellum repudij, and so they might thereby forsake their wiues, as it appeareth Deutro 22. and therefore like as a dispensation was suffered against that bond, so it seemeth it may bee a-

gainſt

gainſt this ſtatute. D. As to that reaſon that thou haſt laſt made of a bill of refuſall, let all purchaſors of land heare what our Lord ſaith in the Goſpell of the Iewes, of that bill of refuſall, Mathew 19. where he ſaith thus, For the hardneſſe of your hearts Moſes ſuffered you to leaue your wiues: for at the beginning it was not ſo. Of which words Doctours hold commonly that though ſuch a bill of refuſall was lawfull ſo that they that refuſed their wiues therby, ſhould be without paine in the law, that yet it was neuer lawfull ſo that it ſhould bee without ſin. And ſo likewiſe it may be ſaid in this caſe that ſuch recoueries bee ſuffered for the hardneſſe of the hearts of Engliſhmen, which deſire land and poſſeſſion with ſo great greedineſſe that they cānot be withdrawne frō it neither by the law of God nor of the realme: And therefore the rich men ſhould not take the poſſeſſions of poore men from them by power, without colour of tytle, that is to ſay, neither by open Diſſeiſin, or by the onely ſale of the tenaunt in taile, and ſo to hold them againſt the expreſſe words of the ſtatute, ſuch recoueries haue bin ſuffered. And though for their great multitude they may happily be without paine as to the law of the Realme: yet it is to feare that they bee not without offence, as againſt God: and as to the other reaſon, that a cōmon error ſhould make a right, thoſe words as mee ſeemeth be to be thus vnderſtood, that a cuſtom vſed againſt the Law of man ſhall be taken in ſome countries for law, if the people be ſuffered ſo to continue. And yet ſome men call ſuch a cu-

a custome an error, because that the continuãce of that custome against the law was partly an errour in the people, for that they would not obey the Law that was made by their superiours to the contrarie of that Custome: but it is to bee vnderstood that the said recoueries though they haue beene long vsed, may not bee taken to haue the strength of a custome, for many as well learned as vnlearned haue alway spoken against them and yet doe. And furthermore as I haue heard say, a custome or a prescription in this Realme against the statutes of the realm preuaile not in the law S. Though a custome in this Realme preuaileth not against a Statute as to the Law, yet it seemeth that it may preuaile against the statute in conscience: for though ignorance of a statute excuseth not in the law, nevertheless it may excuse in conscience, and so it seemeth that it may do of a custome. Do. But if such recoueries cannot be brought into a lawfull custome in the Law, it seemeth they may not be brought into a Custome in conscience, for conscience must alway bee grounded vpon some Law, and in this case it cannot be grounded vpon the law of reason, nor vpon the Law of God: and therefore if the Law of man serue not, there is no ground whereupon conscience in this case may bee grounded, and at the beginning of such recoueries, they were taken to be good because the Law should warrant them to bee good, and not by reason of any Custome, and so if the reason of the Law will not serue in the recoueryes, the custome cannot helpe, for an euill Custome

is to be put away. And therefore mee seemeth that the recoueries bee not without offence against god, though happily for their great multitude, and that there should not be as it were a subuersion of the inheritance of many in this Realme, as well of spirituall or temporal, they be without paine in the Law of the Realme, except such recoueries as by the cõmon course of the Law be voidable in the Law by reason of some vle, or of some other speciall matter: but what paine that is, I will not temerously iudge, but commit it to the goodnesse of our Lord, whose iudgements be verie deepe and profound, nor I will not fully affirme that they that haue lands by such recoueries ought to be compelled to restitution: but this seemeth to mee to be good counsell, that euery man hereafter hold that is certain, and leaue that is vncertaine, and that is, that hee kẽpe himselfe from such recoueries, and then hee shall be free from all scrupulousnesse of conscience in that behalfe.

Stu. It seemeth that in this question thou pondereſt greatly the said statute of Westminster the second, and that though it be but onely a Law made by man, that yet forasmuch as it is not against the law of reason, nor the Law of God, thou thinkest that it must be holden in conscience: and ouer that as it seemeth thou art somewhat in doubt, whether those recoueries bee any barre to the heire in the taple by the law of the Realme, vnlesse that hee haue in value in deed vpon the vouchee, and that thou wilt thereupon take a respite or thou shew thy

full

full mind therein, and in likewise thou thinkest as I take it, that those recoueries cannot bee brought into a custome, but that the longer that they be suffered to continue if they be not good by the Law, the greater is the offence against God. And therefore thou pondrest little that custome, but yet thou agreest that it is good to spare the multitude of them that be past, least a subuersion of the inheritance of many of this realme might follow, and great strife and variance also, if they should be annulled for the time past, except there be any other speciall cause to anoid them by the Law, as thou hast touched in the last reason: but thou thinkest that it were good, that from henceforth such recoueries should bee cleerely prohibited, and not bee suffered to be had in vse, as they haue beene before, and thou counsellest all men therefore to refrain themselues from such recoueries hereafter. Do. Thou takest well that I haue sayd, and according as I haue meant it. S. Now I pray thee, sith I haue heard thy question of these recoueries, according to thy desire, that thou wouldest aunswere me to some particuler questions concerning Tailed lands, whereof thou hast at this time giuen vs occasion to speake. D. Shew me these questions, & I will shew thee my mind therein with good will.

¶ The first question of the Student, concerning tailed lands.

Cap. 27.

If

IF a disseisor make a gift in taile to John a Stile, and I. at S. for the redeeming of the title of the disseisee, agreeth with him that he shall haue a certain rent out of the same land to him & to his heires, & for the suretie of the rent it is deuised that the disseisie shall release his right in the land &c. & that such a recouerie as we haue spoken of before, shalbe had against the said I. at St. to the vse of the payment of the said rent and of the former taile: whether standeth that recouerie well with conscience or not, as thou thinkest? D. I suppose it doth, for it is made for the strength and suretie of the taile, which the disseisie might haue cleerely defeated and auoided if he would, & therefore I thinke if the said I. at S. had graunted to the disseisie, only by his deed a certain rent for the releasing of his title, that graunt should haue bound the heires in the taile for euer. And then if the disseisie for his more surette will haue such a recouerie, as before appeareth, it seemeth that recouerie standeth with good conscience. S. it seemeth that thy opinio is right good in this matter And also it appeareth that with a reasonable cause, some particular recoueries may stand both with law & conscience to bar a taile.

¶ The second question of the Student, concerning tailed lands.

Cap. 28.

IF a tenant in taile suffer a recouerie against him of his lands entailed, to the intent that

the recouerer shall stand seised thereof, to the vse of a certaine woman whom he intendeth to take to his wife, for terme of life, and after to the vse of the first Taile, and after he marieth the same woman, whether standeth that recouery with conscience, though other recoueries vpon bargaines and sales did not? Do It seemeth yes, for though the statute bee that they to whom the tenements be so giuen, should not haue power to alien, but that the Lands after their death should remaine to their issues, or reuert to the donours, if the issues failed: yet if hee to whom the Lands were so giuen, take a wife, and dyeth seised without heire of his body, and the donour enter, the woman shall recouer against him the third part to hold in the name of her dowry, for terme of her life, though the taile be determined. And the same law is of tenant by the Curtesie, that is to say, of him that happeneth to marry one that is an inheritrix of the Land entailed, and they haue issue, the wife dyeth, and the issue dyeth, he shall hold the lands for terme of his life, as tenant by the curtesie, notwithstanding the words of the statute which say that after the death of the tenaunt in taile without issue, the lands shal reuert to the donor: and I thinke the cause is because the intent of the statute shall not bee taken, that it intended to put away such titles as the Law should giue, by reason of the Taile: and so it seemeth that a like entent of the Statute shalbe taken for Iomtures, for els the statute might be sometime a letting of Matrimonie, and it is not like that the statute intended

so

so. And therefore it seemeth, that by the onely deed of the tenant in taile, a Jointure may be made by the intent of the Statute, though the words of the Statute serue not expresly for it: for many times the intent of the letter shall be taken, and not the bare letter, as it appeareth in the same Statute, where it is said, that hee to whom the lands be giuē shal haue no power to alien: yet the same Statute is construed that neither he nor his heires of his body shal haue no power to alien: & so mee thinketh that such an intent shall be taken here for sauing of iointures. St. Truth it is, that sometime the intent of a Statute shalbe taken further than the expresse letter stretcheth, but yet there may no intent bee taken against the expresse words of the Statute, for that should bee rather an interpretation of the statute, than an exposition: and it cannot bee reasonably taken, but that the intent of the makers of the sayd Statute was, that the land should remaine continually in the heires of the taile, as long as the taile endureth: and there can no Jointure be made neither by deed nor by recouerie, but that the taile must thereby be discontinued, and therefore this case of iointure is not like to the said cases of Tenant in Dower, or Tenant by the Curtesie: for the title of Dowrie, and of Tenaunce by the Curtesie groweth most specially by the continuance of the possession in the heires of the Taile, but it is not so of iointures: and therefore by the onely deed of the Tenaunt in the Taile, there may no Jointure bee lawfully made against the expresse words

of the Statute. And if there be any made by way of recouery, then it seemeth that it must be put vnder the same rule, as other recoueries must be of lands entailed.

¶ The third question of the Student concerning tailed lands.

Cap. 29.

IF John at Noke being seised of lands in fee of his meer motiō make a feoffement of certaine lands to the intent that the feoffees shal thereof make a gift to the said Io. at Noke to haue to him and to his heires of his bodie, and they make the gift accozding; And after the said I. at Noke falleth into debt, wherefoze he is taken and put in pzison, and thereupon foz payment of his debts, hee selleth the same land and foz surette of the buyer he suffereth a recouery to bee had against him in such manner as before appeareth, whether standeth that recouery with conscience oz not? D. I would here make a little digressiō to aske thee another question oz that I make answere to thine: that is to say, to feele thy mind how the Law by the which the bodie of the debtoz shal be taken and cast into pzison, there to remain til he haue paid the debt, may stand with conscience, specially if hee haue nothing to pay it with, foz as it seemeth if hee will relinquish his goods which in some laws is called in latine Cedere bonis, that he shall not bee impzisoned, and that is to bee vnderstood most specially if hee bee fallen into

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pouertie, and not through his owne default. S. There is no law in the realme that the defendant may in any case Cedere bonis, & as me seemeth if there were such a law, it should not bee indifferent, for as to the knowledge of him that the money is owing to, the debtor might Cedere bonis, ỹ is to say, relinquish his goods, and yet retaine to himselfe secretly great riches. And therefore that Law in such case seemeth more indifferent & righteous that committeth such a debtor to the conscience of the plaintife to whom the money is owing, than the committing him to the conscience of him that is the debtor: for in the debtor some default may be alligned, but in him to whom the money is owing, may be alligned no default. D. But if he to whom the debt is owing, knoweth that the debtor hath nothing to pay the debt with, and that hee is fallen into pouertie by some casualtie, and not through his owne default, doth the law of England hold, that he may with good conscience keepe the debtor still in prison till he be paid? St. May verily, but it thinketh more reasonable to appoint the libertie and the iudgement of conscience in that case to the debtee than to the debtor, for the cause before rehearsed. And then the debtour, if hee knew the trueth, is (as thou hast said) bound in conscience to let him goe at libertie though hee bee not compellable thereto by the Law. And therefore admitting it for this time, that the law of England in this point is good and iust, I pray thee that thou wilt make answere to my question. Doct. I will with good will, and

therfore as me seemeth, for asmuch as it appeareth that the saide gift was made of the meere liberty and free will of the said John at Noke, and without any recompence: that therefore it cannot bee otherwise taken, but that the intent of the said J. at Noke, as well at the time of the saide feoffement, as at the time that hee receiued again the said gift in the tayle, was, that if hee happened afterwards to fal into pouerte, that he might alien the said Land to releue him with, for how may it be thought that a man will so much ponder the wealth of his heire, that he will forget himselfe? and so it seemeth that not onely the said recouerie standeth with conscience, but also if he had made only a feoffement of the land, the feoffement should be in conscience a good barre of the taile: but if the said feoffement and gift had bin made in consideration of any recompence of money, or for any matrimony or such other, then the feffement of the said J. at N. should not bind his heire, & if he then suffred any recouery therof, then the recouery should bee of like effect as other recouerie whereof we haue treated before, & that which I said it was good to fauour rather for their multitude thā for the conscience: and the same law is, that if the son and the heire of the said J. at Noke in case that the said gift was made without recompence, alien the land for pouerty after the death of his father, the recouery bindeth not but as other recouerie doe: for it cannot bee thought that the intent of the father was, that any of his heirs in taile shold for any necessity disherite all other heires in taile

taile that should come after him, but for himselfe mee thinketh it is reasonable to Judge in such maner as I have said before. &c. And though the intent of the said John at Stoke, when he made the said feoffement, and when he take againe the said gift in taile, were that if he fel in need that he might alien: yet I suppose that he may not alien though percase for the more sure tie he declared his intent to be such upon the liuery of seisin: for that intent was contrary to the gift that he freely take upon him, and when any intent or condition is declared or reserued against the state that any man maketh or excepteth: then such an intent or condition is void by the law, as by a case that hereafter followeth will appeare, that is to say, If a man make a feoffement in fee, upon condition that the feoffee shall not alien to any man, that condition is voyd, for it is incident to euery state of the fee simple, that hee that is so seised may alien. And like as in a fee simple there is incident a power to alie, so in a state taile there is a secret intent understood in the gift, that no alienation shalbe made. And therefore though the intent of the said Jo at St. were, that if he fell into pouertie that he might sel, and though he at the taking of the gift openly declared his intent to be so: yet the intent should be void by the law as me seemeth, and if it be void by the law, it is also void in conscience, and so the said recouery must be taken in this case to be of the same effect, as recoueries of other lands intailed bee, and in no other maner.

¶ The fourth question of the Student, concerning Recoueries of Enheritances entailed.

Cap. 30.

IF an Annuitie be graunted to a man to haue and to perceiue to the grantee, & to the heires of his bodie, of the coffers of his grantor: and after the grantee suffereth a recouerie against him in a writ of Entre, by the name of a rent in Dale of a like sum as the Annuitie is of, with vouchers & iudgement after the cõmon course, and both parties intend that the Annuitie shall be recouered: whether shall the recouery bind the heire in taile of his Annuitie? D. What if it were a rent going out of Land, of what effect, should the recouery be then? Stu. It should be then of like effect as if it were of land Do. And so it seemeth to be of this Annuitie, for as mee thinketh, a rent, and Annuitie bee of one effect, for the one of them shal be paid in ready money as the other shall. S. Turneth, and yet there be many great diuersities betwixt them in the law. D. I pray thee shew me some of those diuersities. Stu. Part I shall shew thee, but I wot not whether I can shew thee all, but first thou shalt vnderstand that one diuersity is this. Euerie Rent, be it Rent seruice, Rent charge, or Rent secke, is going out of land, but an Annuitie goeth not out of any Land, but chargeth onely the person, that is to say, the Graunter, or his heires that haue Assets by discent, or the house if it bee graunted by a house

house of Religion to perceiue of their cofers. Also of an Annuitie there lyeth no action, but onely a writ of Annuitie against the graunter, his heires, or successors, and that writ of Annuity lyeth neuer against the pernour, but only against the grantor or his heires: but of a rent, the same action may lye, as doth of land as the case requireth, and it lyeth sometime of rent against the pernour of the rent, that is to say, against him that taketh the rent wrongfully, and sometime against neither. As of a rent seruice, Assise may lye for the Lord against the Meine, & the Disseisor, or sometime against the Meine onely, if he did also the disseisin. Also an Annuitie is neuer taken for an assets, because it is no freehold in the Law, ne it shall not be put in execution vpon a statute Merchant, statute Staple, ne Elegit, as a rent may. And because the said Writ of Entre lay not in this case of this annuity, & that it cannot be intended in the law to be the same annuity, though it be of like sum with the annuity, ne though the parties assented & meant to haue the same annuity recouered by the said writ of Entre, therefore the said recouerie is void in law & conscience. But if such a recouery bee had of rent with a voucher ouer, then it shall be taken to be of like effect, as recouerties of lands bee in such manner as we haue treated of before.

¶ The fift question of the Student concerning tailed Lands.

Cap.

Cap. 31.

If lands bee giuen to a man and to his wife in the name of her Ioynture, by the father of the husband, to haue and to hold to them and to the heires of their two bodies, begotten, and after they haue issue and the husband dieth, and the wife alieneth the land, & against the statute of 11. H. 7. suffereth a recouery thereof to be had against her, to the vse of the buyer, & after her sonne & heire apparant that is heire to the taile releaseth to the recouerees by fine, & dyeth, hauing a brother alue, and after the mother dyeth: Who hath right to the land, the buyer, or the brother of him that released? D. What is thine opinio therin, I pray thee shew me. S. Me seemeth that the buyer hath right, for by the saide statut made in the 11. yere of H. 7. among other things it is enacted, that if any woman which hath lands of the gift of her husband, or of the gift of any of the Auncestors of the husband suffer any recouery thereof against her, by couin. that then such recouery shalbe voyd, & that it shall bee lawfull to him that should haue the Land after the death of the woman to enter, & it to hold as in his first right: prouided alway that that statute shall not extend where he that should haue the land after the death of the woman is agreeable to any such alienation or recouery, so that the agreement be of record. And forasmuch as the heire in this case agreed to ꝑ said recouery & fine, which is one of the highest Records in the law, it seemeth that the buyer hath right against that heire that agreed, and against

against all that shall bee heire of the taile, and that not onely by the said recouerie, but also by the said statute, whereby the sayde recouery with assent of the heir is affirmed. D. Though the buyer in this case haue right during the life of the heire that released, yet neuertheleſſe, after his death his heir as it seemeth may lawfully enter: for the agreement wherof the statute speaketh, must as I suppose either be had before the recouery, or elle at the time of the recouery: For if a Title by reason of the sayde statute be once deuolute to the heire in the tail, then the right as mee seemeth cannot be extinct nor put away by the onely fine of the heire, no more than if he had died, and the next heire to him had released to the buyer by fine, in which case the release could not extinct the right of the Title, nor the right of Entre that is giuen by the statute: and so as mee seemeth, his next heire may therefore enter. S. As I perceiue all thy doubt is in this case, because the assent of the heire was after the recouery: for if it had been at the time of the recouery, as if the heire had bin vouched to warrant in the same recouery, and he had entred, and thereupon the iudgement had beene giuen, thou agreest wel, that the recouery should haue auoided the taile for euer.

Doctor. That is true, for it is in expresse words of the Statute, but when the assent is after the recouery, then mee thinketh it is not so, ne that the right of the first taile, which was receiued by the said Statute, shall not bee extinct by his fine, no more than it shall in other

other taile. Stu. I will be aduised vpon thy opinion in this matter, but yet one thing would I moue further vpon this Statute, and that is this: Some say, that by this statute all other recoueries that haue bin had ouer beside these recoueries of Ioyntures be affirmed: for they say, that sith the Parliament at the making of this Statute, knew well that many other recoueries were then vsed and had, to defeate Tailes, that it was like that they would so continue, which neuertheles the Parliament did not prohibit for the time to come, as it did the said Recoueries of Iointures: that it is therefore to suppose, that they thought that they should stand with Law and conscience: but because Iointures were made rather for the sauing of inheritance of the husband than to destroy the inheritance, they say that the Parliament thought and adiudged the alienations and recoueries of such Iointures to be against the law & conscience, and not the Alienations of other lands entailed: for if they had, they say that the Parliament would haue auoided recoueries of tailed lands generally, as well as it did of Recoueries of Iointures. Do. As to that opinion I will answere thee thus for this time, that though that the makers of the said estatute onely put away recoueries of Iointures, and not other recoueries that yet it cannot be taken therefore that their intent was that the other Recoueries should stand good & perfect: for they spake them onely of Ioyntures, because there was no complaint made in the Parliament at that time, but against

against recoueries had of Iointures, and therfore it seemeth that they intended nothing concerning other recoueries, but that they should bee of the same effect as they were before, and no otherwise. And that will appeare more plainly thus: though the makers of the sayde statute intended to put away & annull such recoueries as should bee made of iointures after a certaine day limited in the Statute, that yet they intended not to auoid ne affirme such recoueries of Iointures as were pleaded before that time: and if thy intended not to auoid ne affirme the recoueries had of ioyntures before that time, then how can it bee taken, that they intended to put away, or affirme other recoueries that were pleaded before that time, & not of Ioyntures, that would not affirme, ne put away recoueries pleaded of iointures before that time? And so, as it seemeth, they intended to spare the multitude of them that were pleaded of both, and not to comfort any to take them after that time. Stu. I am content thy opinion stand for this time, and I will aske thee another question.

¶ The sixt question of the Student concerning tailed lands.

Cap. 32.

IF tenant in taile be disseised, & die, & an auncestor collaterall to the heire in taile release with a warranty, & die, & the warrãty discẽdeth vpon the heire in the taile: whether is he there-

therby barred in conscience, as he is in the law? D. Because your principall intent at this time is to speake of recoueries, & not of warranties, & also because it hath bin of long time taken for a principal maxime of the law, that it should be a barre to the heires aswel that claime by a fee simple, as by state taile, and for that also that it was not put away by the said statute of W. 2. which ordained the taile, I will not at this time make thee an answere therein, but will take a respite to be aduised. Stu. Then I pray thee yet or we depart, shew me what was the most principall cause that moued thee to mene this question of recoueries had of tailed landes. D. This moued me thereto: I haue perceiued many times that there bee many diuers opinions of these Recoueries, whether they stand with conscience or not, & that it is to doubt that many persons run into offence of Conscience thereby. And therefore I thought to feele thy mind in them, whether I could perceiue that it were clere, that they serued to breake the taile in law and conscience, or that it were clerly against conscience so to breake the taile, or that it were a matter in doubt: if it appeared a matter in doubt, or that it appeared that the matter were vsed clerely against conscience, then I thought to do somewhat to make the matter appeare as it is, to the intent that they that haue the rule & charge ouer the people as well the spirituall men as temporal men, should the rather endeuour them to see it reformed for the commonwealth of the people, aswell in bodie as in soule. For when any thing is vsed to the dis-

displeasure of God, it hurteth not onely the body, but also the soule. And tẽporall rulers haue not onely care of the bodies, but also of the soules, & shal answere for them if they perish in their default. And because it semeth by ẽ more apparent reason that the tailes be not broken, ne fully auoided by the said recouerties, & that yet neuertheless the great multitude of them that be passed is right much to bee pondered: Therfore it were very good to prohibite them for time to come, to put away such ambiguities and doubts as arise now by occasio of the said recouerties, and so they be put as snares to deceiue the people, and so will they be as long as they be suffered to cõtinue. And me thinketh verily that it were therefore right expedient, that tailed lands should from henceforth eyther be made so strong in the law, that the taile should not bee broken by recouery, fine with proclamation, collaterall warranty, nor otherwise: or else that all tayles should be made fee simple, so that euery man that list to sell his land, may sell it by his bare feoffement, & without any scruple or grudge of conscience: & then there should not be so great expẽces in the law, nor so great variance among the people, ne yet so great offence of conscience as there is now in many persons. S. Verily mee thinketh that thy opinion is right good, & charitable in this behalfe: and that the rulers bee bound in conscience to looke vpon it to see it reformed and brought into good order. And verily by that thou hast said therin, thou hast brought me into remembrance, that there be diuers like snares

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concerning spirituall matters suffered among the people, wherby I doubt that many spirituall rulers be in great offence against God. As it is of the point that spirituall men haue spoke so much of, that priests should not be put to answere before lay men, specially of felonies and murders: and of the statute of 45. E. 3. c. 3. wher it is said, that a Prohibition shall lye where a man is sued in the spirituall Court for tithe of wood, that is aboue the age of xx. peres, by the name of Silua Cedua as it hath done before: and they haue in opē sermōs & in diuers other opē cōmunications & counsells caused it to be opēly notified & known, that they should bee all accursed that put priests to answer or that maintain the said estatut, or any other like to it. And after when they haue right wel perceiued, that notwithstanding all that they haue done therein, it hath bin vsed in the same points through all the realme, in like maner as it was before: then they haue sat still & let the matter pas, & so whē they haue brought many persons in great dāger, but most specially thē that haue giuen credence to their saying, & yet by reason of ȳ old custome haue done as they did before, thē there they left them: but verily it is to feare that there is to themselues right great offence therby, that is to say, to see so many in so great danger as they say they bee, and to doe no more to bring them out of it, than they haue done for it: if it be true as they say, they ought to sticke to it with effect in all charitie, till it were reformed: and if it be not as they say, then they haue caused many to offend that haue giuen credēce

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to them, and yet contrarie to their owne conscience do as they did before, & that percase should not haue offended if such sayings had not bin. And so it seemeth that they haue in these matters done either too much, or too little.

And I beseech Almightie God, that some good man may so call vpon all these matters, that we haue now communed of, so that they that bee in authoritie may somewhat ponder them, and to order them in such maner that offence of conscience grow not so lightly thereby hereafter, as it hath done in times past. And verily he that on the Crosse knew the price of mans soule, will hereafter aske a right strait accompt of rulers for euery soule that is vnder them, and that shall perish through their default.

Thus haue I shewed vnto thee in this little Dialogue, how the Law of England is grounded vpon the Law of reason, the law of God, the generall Customes of the realme, and vpon certaine principles that be called Maxims, vpon the particuler Customes vsed in diuers Cities and countries, and vpon Statutes which haue bin made in diuers Parliaments by our Soueraigne Lord the King and his progenitors, and by the Lords Spirituall and Temporall, and all the Commons of the Realm. And I haue also shewed thee in the 9. Chapter of this Booke, vnder what maner the said generall Customes and Maxims of the law may be proued & affirmed if they were denied, & diuers other things bee contained in this present Dialogue, which will appeare in

the table that is in the later end of the Booke, as to the readers will appeare. And in the end of the said dialogue, I haue at thy desire shewed thee my conceit concerning Recoueries of tailed lands, and thou hast vpon the sayd recoueries shewed mee thine opinion. And I beseech our Lord set them shortly in a good cléere way: for surely it will be right expedient for the well ordering of conscience in many persons, that they be so. And thus the

God of peace and loue
be alway with vs
Amen.

Ere endeth the first Dialogue in Englisſh, with new additions, betwixt a Doctor of Diuinitie, and a Student in the Laws of England. And hereafter followeth the ſecond.

In the beginning of which Dialogue the Doctor anſwereth to certaine queſtions, which the Student made to the Doctor before the making of his Dialogue, concerning the Lawes of England and conſcience, as appeareth in a Dialogue made betweene them in Latine the 24. ch. And he aunſwereth alſo diuers other queſtions, that the Student maketh to him in this Dialogue, of the law of England and conſciẽce. And in diuers other Chapters of this preſent Dialogue is touched ſhortly, how the Lawes of England are to bee obſerued and kept in this Realme, as to temporall things aſwell in Law as in conſcience, before any other Lawes. And in ſome of the Chapters thereof, is alſo touched that ſpirituall Iudges in diuers caſes bee bound to giue their Iudgements according to the kings Law. And in the later end of the Booke the Doctor moueth diuer caſes concerning the Lawes of England wherin hee douteth how they may ſtand with conſcience, whereupon the Student maketh aunſwere in ſuch maner as to the Reader will appeare.

IN the latter end of our first Dialogue in Latin, I put diuers cases grounded vpon the Lawes of England, wherein I doubted, and yet doe, what is to bee holden therein in conscience. But forasmuch as the time was then farre past, I shewed thee that I would not desire thee to make answere to them forthwith at that time, but at some better leasure, whereunto thou saiest thou wouldest not onely shew thine opinion in these cases, but also in such other cases as I would put: wherefore I pray thee now (forasmuch as mee thinketh thou hast good leasure) that thou wilt shew me thine opinion therein. Do. I will with good will accomplish thy desire: but I would that when I am in doubt what ꝑ law of this realm is in such cases as thou shalt put, that thou wilt shew me what ꝑ law is therin: for though I haue by occasiõ of our first Dialogue in Latine learned many things of the lawes of this realm which I knew not before, yet neuertheless there bee many mo things that I am yet ignorãt in, and that paraduenture in these self cases that thou hast put: & intẽdest hereafter to put: as I said in the first Dialogue in Latin the 20. Chap. to search conscience vpon any case of the law it is in vaine, but where the law in the same case is perfectly knowne. Stu. I will with good will doe as thou saiest, & I intend to put diuers of the same questions, that be in the last Cha. of the said Dialogue in Latin, & sometime I intend to alter some of them, and adde some new questions to them, as I shall be moste in

in doubt of. D. I pray thee do as thou saist, and I shall with good will either make answer to them forthwith as well as I can, or shall take longer respit to be advised, or else paraventure agree to thine opinion therein, as I shall see cause. But first I would gladly know ỹ cause why thou hast begun this Dialogue in the English tongue, and not in the Latin tongue, as ỹ first cases that thou desirest to know mine opinion in, be, or in French as the substance of the law. S. The cause is this. It is right necessarie to all men in this realme, both spirituall & temporal for the good ordering of their cõscience, to know many things of the Law of England that they be ignorant in. And though it had bin more pleasant to them that be learned in the Latin tongue, to have had it in latin rather than in English: yet neuertheless forasmuch a many can read English that understãd no Latin, & some ỹ cãnot read English, by hearing it read may learne diuers things by it, that they should not have learned if it were in Latin: Therfore for the profit of the multitude it is put into the English tongue rather than into the latin or Frẽchtongue. For if it had bin in French, few should have vnderstood it, but they that be learned in the law, and they have least nede of it, forasmuch as they know the law in the same cases without it, & can better declare what conscience will thereupon, than they that know not the law nothing at all. To them therefore that be not learned in the law of the realme this treatise is spectally made: for thou knowest well by such studies thou hast

taken to some knowledge of the Law of the realme, that is to them most expedient. Doct. It is true that thou saiest, and therefore I pray thee now proceed to thy questions.

¶ The first question of the Student.

Cap. 1.

IF tenant in tail after possibility of issue extinct, doe wast, whether doth he therby offend in conscience though he be not punishable of wast by the law? D. Is the law cleare that he is not punishable for the wast? Stu. Ye verely. D. And what is the law of tenants for terme of life, or for terme of yeares if they do wast? S. They be punishable of wast, by the statutes, and shall yeeld treble damages: but at the common law before the statute they were not punishable. D. But whether thinkest thou that before the statute they might have done wast with conscience, because they were not punishable by the Law. St. I thinke not, for as I take it, the doing of wast of such particuler tenant for terme of life, for terme of yeares, or of tenants in Dower, or by the curtesie, is prohibited by the Law of reason, for it seemeth of reason that when such leases be made, or that such titles in Dower, or by the curtesie be given by the Law, that there is onely given unto them the annuall profits of the land, and not the houses and trees, and the grauell to digge and carrie away, whereby the whole profit of them in the reuersion should bee taken away

for

for euer. And therefore at the common law for waſt done by tenant in dower, or tenant by the curteſie, there was puniſhment ordained by the Law, by a prohibition of waſt, whereby they ſhould haue yeelded dammages to the value of the waſt. But againſt tenant for terme of life or for terme of yeares, lay no ſuch prohibition, for there was no Maxime in the law therein, againſt them, as there was againſt the other. And I thinke the cauſe was, foraſmuch as it was iudged a folly in the leſſor that made ſuch a leaſe for terme of life, or for terme of yeares, that at the time of the leaſe he did not prohibit them they ſhould not doe waſt, and ſith hee did not prouide no remedie for himſelfe, the Law would none prouid. But yet I thinke not that the intent of ꝑ law was, that they might lawfully and with good conſcience doe waſt, but againſt Tenants in dower, and by the curteſie the law prouided remedy, for they had their title by the law.

And verily me thinketh that this tenant in taile as to doing of waſt, ſhould be like to a tenant for terme of life: for he ſhall haue the land no longer than for term of his life, no more thā a tenant for terme of life ſhall, and the waſt of this tenant is as great hurt to him in the reuerſion or the remainder, as is the waſt of a tenaunt for terme of life, and if hee alien, the donor ſhall enter for the forfeiture, as hee ſhall vpon ꝑ alienation of a tenant for terme of life and if he make default in a Præcipe quod reddat, the Donor ſhall be receiued as he ſhall bee vpon the default of a tenant for terme of life:

and therefore me thinketh hee shall also be punishable of Wast, as tenant for term of life shal. S. If he alien, the donor shal enter as thou saist because the alienation is to his disheritance, & therfore it is a forfeiture of his estate: and that is by an ancient Maxime of the Law that giueth that forfeiture in the selfe case, and if hee make default in a Præcipe qđ reddat, he in the reuersiõ, as thou saist shal be receiued, but that is by the statute of West. 2. for at the Common law there was no such receit: & as for the statute that giueth the action of Wast against a tenant for terme of life, and for terme of yeres, it is a statute penall, and shall not be taken by equitie: & so there is no remedy giuen against him, neither by common law nor by statute, as there is against tenant for terme of life. & therfore he is vnpunishable of Wast by the law. D. And though he be vnpunishable of Wast by the law, yet neuertheless me thinketh he may not by conscience doe that, that shall be hurtfull to the inheritance after his time, sith he hath the Land but for terme of his life, no more than a tenant for terme of life may, for then he should doe as he would not be done vnto For thou agreest thy selfe, that though a tenant for terme of life was not punishable of Wast before the Statute, that yet the Law iudged not that he might rightfully and with good conscience doe Wast. And therefore at this day if a feoffement bee made to the vse of a man for terme of life, though there lie no actiõ against him for Wast, yet he offendeth in conscience if he do Wast, as Tenaunt for terme of life did afore the Sta-

tute

tute, when no remedy lay against him by the law. St. That is true, but there is great diuersitie between this tenant and a tenant for term of life: for this tenant hath good authority by the donour to doe waste, and to hath not the tenant for terme of life, as it is said before: for the estate of a tenaunt in taile after possibility of issue extinct, is in this maner, when lands be giuen to a man and to his wife, & to the heires of their two bodies begotten, and after the one of them dyeth without heires of their bodies begotten, then he or she that ouerliueth, is called tenant in taile after possibilitie of issue extinct, because there can neuer by no possibility be any heire that may inherite by force of the gift. And thus it appeareth that the donees at the time of the gift, receiued of the donor estate of inheritance, which by possibility might haue continued for euer, whereby they had power to cut downe trees, and to doe all thing that is waste, as tenant in fee simple might. And that authority was as strong in the law, as if the lessour that maketh a lease for terme of life, say by expresse words in the lease, that the Lessee shall not be punishable of waste. And therefore if the Donour in this case had graunted to the Donee that they should not bee punishable of waste, that grant had bin void, because it was included in the gift before, as it should be vpon a gift in fee simple: and so forasmuch as by the first gift, and by the Liuerie of seisin made vpon the same, the Donees had authority by the donour to do waste; therefore though that one of those Donees be now dead without issue, so

that

that it is certaine, that after the death of the other, the land shall reuert to the donor: yet the authoritie that they had by the Donour to doe waste, continueth as long as the gift, and the liuery of seisin made vpon the same continueth. And I take this to be the reason why he shall not haue in aid as tenant for terme of life shall, that is to say, for that hee cannot alege the helpe of that Maxime, whereby it is ordained, that a tenant for terme of life shall haue in ayd: for he cannot say, but that he take a greater estate by the liuery of seisin that was made to him, which yet continueth, than for terme of life: and so I thinke him not bound to make any restitution to him in the reuersion in this case, for the Waste. Do. Is thy mind only to proue that this tenant is not bound to make restitution to him in the reuersion for the waste? or that thou thinkest that he may with cleere conscience doe all manner of waste? S. I intend to proue no more but that hee is not bound to restitution to him in the reuersion. D. Then I will right well agree to thine opinion for the reason that thou hast made: but if thy mind had bin to haue proued that he might with cleere conscience haue done all maner of waste, I would haue thought the contrary thereto, & that the tenant in fee simple may not do al maner of waste and destruction with conscience, as to pull down houses and make pastures of cities and townes, or to doe such other acts which be against the common-wealth. And therfore some will say, that tenant in fee simple may not with conscience destroy his woods & coale pits whereby a whole countrey

trey for their mony haue had fuel, & yet though he do so, he is not bound by conscience to make restitution to no person in certain. But now I pray thee ere thou proceed to the second case, that thou wilt somewhat shew me what thou meanest when thou saiest, at the common Law it was thus or thus? I understand not fully what thou meanest by that terme, at the common Law. St. I shall with good will shew thee what I meane thereby.

¶ What is meant by this terme when it is said, thus it was at the Common Law.

Cap. 2.

The common law is taken three manor of wates. First it is taken as ye law of this realm of England dissevered frō all other Lawes. And under this manner taken, it is oftentimes argued in the lawes of England, what matters ought of right to be determined by the common Law, and what by the Admirals Court, or by the Spirituall Court: And also if an Obligation beare date out of the realme, as in Spaine, Fraunce, or such other, it is said in the Law & trueth it is, that they be not pleadable at the common law. Secondly the common law is taken as the kings courts of his Bench, or of the Common Place, and it is so taken when a plee is removed out of ancient demesne for that the land is franke fee & pleadable at the cōmon Law, that is to say, in the Kings court, and not in Ancient demesne.

And

And vnder this maner taken, it is oftentimes pleaded also in base Courts, as in courts Barons, the countp, and the court of Pipounders, and such other, this matter or that &c. ought not to be determined in that Court, but at the Common Law, that is to say, in the Kings Courts &c. Thirdly, by the Common law is vnderstood such thinges as were law before any stat. made in that point that is in question, so that that point was holden for Law by the generall or particuler customes and Maximes of the Realme, or by the law of reason and the law of God, no other law added to them by statute, nor other wise, as is the case before rehearsed in the first chapter, where it is said: that at the Common Law tenant by the curtesie and tenant in dower were punishable of wast, that is to say, that before any statute of wast made, they were punishable of wast by the grounds & Maximes of the law, vsed before the statute made in that point. But Tenant for terme of life, ne for terme of yeres, were not punishable by the said grounds and Maximes, till by the Statute remedy was giuen against them, and therefore it is said, that at the Common Law they were not punishable of wast Do I pray thee now proceed vnto the second question.

¶ The second question of the Student.

Cap. 3.

IF a mā be outlawed & neuer had knowledge of the suit, whether may the king take all his goods

goods, & retaine them in conscience as he may by the law D. what is the reason why they bee forfeited by the law in that case? Stu. The verie reason, for that it is an old custome and an old Maxime in the law, that hee that is Outlawed shall forfeit his goods to the King, and the cause why that Maxime began, was this: When a man had done a trespasse to another, or another offence wherefore processe of vtlarie lay, and hee that the offence was done to, had taken an action against him according to the Law, if hee had absented himselfe and had no lands, there had beene no remedy against him: for after the law of England no man shall bee condemned without answere, or that he appeare and will not answere, except it bee by reason of any Statute. Therefore for the punishment of such offendors as will not appear to make answere and to bee iustified in the Kings Court, hath beene vsed without time of mind, that an attachment in that case should bee directed against him retournable in the Kings Bench or the Common place: and if it were returned thereupon that he had nought whereby hee might bee attached, that then should goe forth a Capias to take his person, and after an Alias Capias, & then a Pluries: and if it were returned vpon euery of the said Capias that hee could not bee found and hee appeared not, then should an Exigent bee directed against him, which should haue so long a day of retourne, that fiue Counties might be holden before the retourne thereof, and in euerie of the said fiue Counties, the defendant to bee

for

solemnly called, and if hee appeareth not, then for his contumacie and disobedience of the law, the Coroners to give Judgement that he shall bee Outlawed, whereby hee shall forfeit his goods to the king, and leese diuers other aduantages in the Law that needeth not here to bee remembred now. And so because hee was in this case called according to the Law and appeared not, it seemeth that the King hath good title to the goods both in law and conscience.

V. If hee had knowledge of the suit in very deed, it seemeth the King hath good title in conscience as thou saiest. But if hee had no knowledge thereof, it seemeth not so, for the default that is adiudged in him (as appeareth by thine owne reason) is his contumacie and disobedience of the law, and if he were ignorant of the suit, then can there bee assigned to him no disobedience: for a disobedience implyeth a knowledge of that he should haue obeyed vnto.

Stu. It seemeth in this case that hee should bee compelled to take knowledge of the suit at his perill: for sith hee hath attempted to offend the Law, it seemeth reason that he shalbe compelled to take heed what the Law will doe against him for it, and not onely that, but that he should rather offer amends for his Trespasse than to tarie till he were sued for it.

And so it seemeth the ignorance of the suite is of his owne default, specially sith in the law is set such order that euery man may know if he will, what suite is taken against him, and may see the Records thereof when hee will: and so it seemeth that neither the partie nor

the

the law bee not bounden to giue him no knowledge thereof. And ouer this I would somewhat moue further in this matter thus. That though that action were vntrue, and the defendant not guiltie, that yet the goods be forfeited to the King for his not appearance, in law, and also in conscience, and that for this cause: the King as Soueraigne and head of the Law, is bounden of Iustice to graunt such writs, and such processes as be appointed in the law, to euery person that will complaine, be his surmise true or false, and thereupon the King (of Iustice) oweth as well to make Processe, to bring the defendant to answere, when he is not guiltie, as when he is guiltie: and then when there is a Maxime in the Law, that if a man be outlawed in such manner as before appeareth, that hee shall forfeit all his goods to the King, and maketh no exception whether the Action bee true or vntrue. It seemeth that the said Maxime more regardeth the generall ministration of iustice, than the particuler right of the partie: and therefore the propertie by the Outlary, and by the said Maxime ordained for ministration of iustice, is altered and is giuen to the King, as before appeareth. and that both in law and in conscience, as well as if the action were true. And then the partie that is so outlawed is driuen to sue for his remedie, against him that hath so caused him to be outlawed vpon an vntrue action.

D. If he haue not sufficient to make recompence, or die before recouerie can be had, what remedie is had then? St. I thinke no remedie:

and

and for a further declaratiõ in this case and in such other like cases, where the propertie of goods may be altered without consent of ꝯ owner, it is to consider that the propertie of goods is not giuen to the owners directly by the law of reason, nor by the law of God, but by ꝯ law of man, & is suffered by the Law of reason and by the law of God so to bee. For at the beginning all goods were in common, but after they were brought by the law of man into a certain property, so that euery man might know his own: and then when such propertie is giuẽ by the law of man, the same law may assigne such conditions vpon the propertie as it listeth. So they be not against the law of God, ne the law of reason, and may lawfully take away that it giueth, and appoint how long the propertie shall continue. And one condition that goeth with euery property in this Realme is, if hee that hath the propertie be outlawed according to such proces as is ordained by the law, that he shall forfeit the property vnto the king. And diuers other cases there be also, whereby property in goods shall be altered in the law, and the right in Landes also without assent of the owner, whereof I shall shortly touch some without saying any authoritie therein, for the more shortnesse. First by a sale in open market the property is altered. Also goods stollen and seised for the king, or waiued, be forfeit, vnlesse appeale or indictment be sued. Also strayes, if they bee proclaimed, and be not after claimed by the owner within the yeare, be forfeit, & also a Deodand is forfeit to whom soeuer the pro-

per-

perty was before (except it belonged to the K.) & shal be disposed for the soule of him that was slaine therewith: & a fine with a Nonclaime at the Common law, was a barre, if claime were not made within a yeare, as it is now by statut if the claime be not made within 5. yeares. And all these forfeitures were ordained by the law vpon certaine considerations which I omit at this time, but certaine it is that none of them were made vpon a better consideration than this forfeiture of Attagaris was. For if no especiall punishment should haue bin ordeined for offendors that would absent themselues & not appeare when they were sued in the Kings courts, many suits in the Kings courts should haue bin of small effect. And sith this Maxime was ordained for the execution of Iustice, & as much done therein by the common law, as policie of man could reasonably deuise, to make the party haue knowledge of the suit, and now is added thereto by the Statute made the 6 yere of H 8. that a writ of Proclamation shall bee sued if the partie be dwelling in another shire: it seemeth that such Title as is giuen to the King thereby is in good conscience, especially seeing that the King is bound to make processe vpon the surmise of the plaintife, and may not examine but by plea of the party, whether the surmise bee true or not. But if the partie bee returned fiue times called, where indeede hee was neuer called (as in the second case of the last Chapter of the said Dialogue in latine is contained) then it seemeth the party shall haue good remedie by pitition to the King, spe-

tually if he that make the returne be not sufficient to make recompence, or by before recouerie can be had. Do. Now sith I haue heard thine opinion in this case, whereby it appeareth that many things must be seene, or a ful and a plain declaration can be made in this behalf, and seeing also that the plaine answere to this case, shall giue a great light to diuers other cases that may come by such forfeiture: I pray thee giue me a farther respite, ere that I shew thee my full opinion therein, and hereafter I shall right gladly doe it. And therefore I pray thee proceed now to some other case.

¶ The third question of the Student.

Cap. 4

IF a stranger doe wast in lands that another holdeth for terme of life without assent of the tenant for terme of life, whether may he in the reuersiõ recouer treble damages, and the place wasted against the tenant for terme of life according to the statute, in conscience, as he may by the Law, if the stranger be not sufficient to make recompence for the wast done? D. Is the law cleere in this case, that he in the reuersion shall recouer against the tenaunt for terme of life, though that he assented not to the doing of wast? St. Yea verily, and yet if the tenaunt for terme of life had beene bounden in an Obligation in a certaine sum of money that hee should doe no wast, hee should not forfeit his bond by wast of a straunger, and the diuersitie is this.

It

It hath beene vsed as an ancient Maxime in the law, that tenant by the curtesie & tenant in dower should take the land with this charge, that is to say, that they should do no wast themselues, nor suffer none to be done: and when an action of wast was giuen after against a tenāt for terme of life, then was he taken to be in the same case as to the point of wast, as tenant by the Curtesie, & tenant in Dower was, that is to say, that hee should doe no wast, nor suffer none to be done (for there is another Maxime in the law of England, that all cases like vnto other cases shalbe iudged after the same law as other cases be) & sith no reason of diuersity can be assigned why the tenant for terme of life after an action of wast was giuen against him, should haue any more fauor in the law thā the tenaunt by the Curtesie, or tenaunt in Dower should: therefore he is put vnder the same maxime as they be, that is to say, that he shal do no wast, ne suffer none to be done: & so it seemeth that the law in this case doth not consider the ability of the person that doth the wast. Whether he be able to make recompence for ỹ wast or not, but the assent of the said tenāts whereby they haue wilfully taken vpon thē the charge to see that no wast shalbe done. D. I haue heard that if houses of these tenants bee destroyed with lodaine tempest, or with strange enemies ỹ they shal not be charged with wast. S. Truth it is. Do. And I thinke the reason is because they can haue no recouery ouer. St. I take not that for the reason, but that it is an old reasonable Maxime in the Law, that they should

be discharged in these cases, howbeit some will say, that in these cases the law of Reason doth discharge them: & therefore they say, that if a stat. were made, that they should be charged in these cases of wast, ỹ the statute were against reason, & not to be observed: but yet neuertheless I take it not so, for they might refuse to take such estat if they would, & if they will take the estate after the law made, it seemeth reasonable that they take it with the charge & with the condition that is appointed thereto by the Law, though hurt might follow to them afterward thereby: for it is oftentimes seene in the law, that the law doth suffer him to haue hurt without helpe of the law, that will wilfully run into it of his own act not cõpelled therto, & adiudgeth it his follie so to run into it, for which follie he shal also be many times without remedy in cõscience. As if a man take land for term of life, and bindeth himselfe by obligation that he shal leaue the lãd in as good case as he found it, if the houses bee after blowne downe with tempest, or destroyed with strange enemies, as in the case that thou hast put before, he shall be bound to repaire them, or els he shal forfeit his Obligation in law & conscience: because it is his owne act to bind him to it, and yet the law would not haue bound him therto, as thou hast said before. So mee thinketh, ỹ the cause why the said tenants be discharged in the law in an action of wast, when the houses be destroied by sodaine tempest, or by strange enemies, is by a special reasonable maxime in the law wherby they bee excepted from the other generall bond

before

before reherſed, that is to ſay, they ſhall at their perill ſee that no waſt ſhalbe done, & not by the law of reaſon: & ſith there is no maxime in this caſe to helpe this tenant, ne that he cannot bee holpen by the law of reaſon, it ſeemeth that he ſhalbe charged in this caſe by his owne act both in law & conſcience, whether the ſtranger be able to recõpence him or not. D. I doubt in this caſe whether the maxime that thou ſpeakeſt of be reaſonable or not, that is to ſay, ỹ tenaunts by the curteſie, & tenãts in dower were bound by the cõmon law, that they ſhould doe no waſt themſelues, and ouer that at their perill to ſee that no waſt ſhould be done by none other. For that law ſeemeth not reaſonable that bindeth a man to an impoſſibility. And it is impoſſible to prẽuent, ỹ no waſt ſhall be done by ſtrangers: for it may be ſodenly done in the night, that the Tenants can haue no notice of, or by great power that they be not able to reſiſt: & therefore me thinketh they ought not to be charged in thoſe caſes for the waſt, without they may haue good remedie ouer, and then percaſe the ſaid maxime were ſufferable, & els me thinketh it is a Maxime againſt reaſon. S. As I haue ſaid before no man ſhall be cõpelled to take the land vpon him, but he that will take the land, & if he will take the land, it is reaſon he take the charge as the law hath appointed it: and then if any hurt grow to him thereby, it is through his owne act and his owne aſſent, for he might haue refuſed the leaſe if he would. D. Though a man may refuſe to take eſtate for term of life, or for terme of yeres, and a woman may refuſe

to take her Dower, yet tenaunt by the curtesie cannot refuse to take his estate, for immediatly after the death of his wife, the possession abideth still in him by the act of the law without entry: & the I put the case that after the death of his wife, he would sue the possession, and after waste were done by a straunger, whether thinkest thou that hee should aunswere to the waste? S. I thinke he should by the law. D. And how standeth that with reason, seeing there is no default in him? S. It was his default, and at his own perill that he would marrie an inheritrix, whereupon such daunger might follow. D. I put case that he were within age at the marriage, or that the land descended to his wife after he maried her. S. There thou mouest a farther doubt than the first question is: and though it were as thou saiest, yet thou canst not say, but ỳ there is as great default in him, as is in him in the reuersion, & that there is as great reason why hee should bee charged with the waste, as that he in the reuersion should bee disherited and haue no maner remedy, ne yet no profit of the land as the other hath: & though the said maxime may be thought very straite to the said tenaunts, yet it is for to bee fauoured as much as may be reasonably, because it helpeth much the commonwealth: for it hurteth ỳ commonwealth greatly, when lands & houses be destroyed: and if they should aunswer for no waste, but for waste done by themselues, there might be wastes done by straungers by commandement, or assent, in such colorable maner, that they in the reuersion should neuer haue proofe

of

of their assent. Do. I am content thine opinion stand for this time, and I pray thee now proceed to another question.

¶ The 4. question of the Student.

Cap. 5

IF he that is the verie heire be certified by the ordinarie bastard, & after bring an action as heire against another person: whether may any man knowing the truth, be of counsel with the tenant and plead the said certificat against the demaundant by conscience or not? D. Is the Law in this case that all other against whom the demaundant hath title shall take advantage of this certificat, aswell as he at whose suit hee is certified bastard? Verily, & that for two causes, whereof the one is this. There is an old Maxime in the law, that a mischiefe shalbe rather suffered thā an inconuenience: & then in this case if another writ should afterward bee sent to another Bishop in another action, to certifie whether he were bastard or not, paraduenture the bishop would certifie that he were mulier, that is to say, lawfully begotten, & then he should recouer as heire, & so he should in one selfe court be taken as mulier and bastard: for auoiding of which contrariolitie, the law will suffer no moe writs to go forth in that case, & suffereth also all men to take aduantage of the certificate, rather than to suffer such a contradiction in the court, which in the law is called an inconuenience, & the other cause is, because this

certificat of the bishop, is the highest triall that is in the Law in this behalfe, but this is not vnderstood, but where bastardie is laid in one that is party to the writ: for if bastardy be laid in one that is a stranger to the writ, as if vouchee pray in ayd or such other, then that bastardy shalbe tried by xij. men, by which triall hee in whom the bastardy is laid, shall not be concluded, because he is not privy to the triall, & may haue no attaint, but he that is party to the issue may haue attaint, and therefore he shall be concluded & none other but he: & forasmuch as the said maxime was ordained to eschue an inconuenience (as before appeareth) it seemeth that euery man learned, may with conscience plead the said certificat for auoiding thereof, and giue counsaile therein to the partie according vnto the Law, for else the said inconuenience must needs follow. But yet neuertheless I doe not meane therby, that the party may after when he hath barred the demaundant by the said certificat, retain the land in conscience by reason of the said certificat: for though there be no Law to cõpell him to restore it, yet I think wel that hee in conscience is bound to restore it, if hee knew that the demãdant is the very true heire, whereof I haue put diuers cases like in the xbij. Chapter of the first Dialogue in Latine, but my intent is that a man learned in the law in this case and other like, may with conscience giue his counsell according to the law, in auoiding of such things as the law thinketh should for a reasonable cause be eschewed. D. Though hee that doth not know whether hee be bastard

or not, may giue his counsaile, & also plead the said certificat: yet I thinke that he that doth know himselfe to bee the verie true heire may not plead it, and that is for two causes: whereof the one is this: Euerie man is bound by the law of reason to do as he would be done to, but I think that if he that pleadeth that certificate were in like case, he would think that no man knowing the certificate to bee vntrue, might with conscience plade it against him, wherefore no more may hee plead it against none other: The other cause is this, although the certificat be pleaded, yet is the tenant bounden in conscience to make restitution thereof, as thou hast said thy selfe, and then in case that he would not make restitution, then he that pleadeth the plee, should run thereby in like offence, for hee hath holpen to set the other man in such a libertie that he may choose whether hee will restore the Land or not, and so hee should put himselfe to ieoperdie of another mans conscience. And it is written Ecclesiast. 3. Qui amat periculum peribit in illo, that is, hee that wilfully will put himselfe in ieoperdie to offend, shall perish therein. And therefore it is the surest way to eschew perils, for him that knoweth that he is heire, not to plead it. And as for the inconuenience that thou sayest must needs follow, but the Certificat bee pleaded: As to that it may bee aunswered, that it may bee pleaded by some other that knoweth not that he is verie heire, & if the case be so far put that there is none other learned there but hee, then me thinketh that he shall rather suffer the losse incon-

inconuenience, than to hurt his own conscience: for alway charitie beginneth at himselfe, and so euery man ought to suffer all other offences rather than he himself would offend. And now that thou knowest mine opinion in this case I pray thee proceed to another question.

¶ The 5. question of the Student. Cap. 6.

WHether may a man with conscience be of counsel with the plaintife in an actiō at the cōmon law, knowing that the def. hath sufficient matter in conscience whereby he may be discharged by a Subpena in the Chancerie, which he cannot plead at the cōmon law, or not? Do. I pray thee put a case thereof in certain, for else y question is very generall. S. I will put the same case that thou puttest in our first Dialogue in Latin, the 1. Chapter, that is to say: If a man bound in an Obligation pay the money, and taketh no acquitance, so that by the common law he shalbe compelled to pay the money again, for such consideration, as appeareth in the 13. Chapter of the said Dialogue, where it is shewed euidently how the Law in that case is made vpō a good reasonable ground, much necessary for all the people, howbeit, that a man may sometime through his own default, take hurt thereby, wherin I pray thee shew me thine opiniō. D. This case seemeth to be like to the case that thou hast next before this, for that he that knoweth the paiment to be made doth not as he would be done to, if he giue counsell that an action should bee taken to haue it payed a-

gaine.

gaine.S. If hee bee sworne to giue counsell according to the Law, as Serieants at the law bee, it seemeth he is bound to giue counsell according to the Law, for els he should not performe his oath. Do. In these words (according to the Law, is vnderstood the law of God, and the law of reason, aswel as the law & customes of the Realme, for as thou hast said thy selfe in our first dialogue in latin, that the law of God, and the law of reason, be two speciall grounds of the lawes of England, wherefore (as me thinketh) he may giue no counsell (sauing his oath) neither against the law of God, nor the law of reason. And certaine it is that this article, that is to say, y a man shall do as he would be done to, is grounded vpon both the said lawes. And first that it is grounded vpon the Law of reason, it is euident of it selfe. And in the 6. Chapter of Saint Luke, it is said, Et prout vultis vt faciant vobis homines, & vos facite illis similiter, that is to say, All that other men should do to you, do you to them, & so it is grounded vpon the Law of God, wherefore if he should giue counsell against the defendant in that case, hee should do against both the said lawes. S. If the defendant had no other remedy but the cõmon law, I would agree wel it were as thou saist, but in this case he may haue good remedy by a Subpena, and this is the way that shall induce him directly to his Subpena, that is to say, whē it appeareth that the Plaintife shall recouer by Law of God. Though the Defendant may bee discharged by Subpena, yet the bringing in of his proofes there, will be to the charge of

of the defendant, and also the proofes may bee or they come in. Also there is a ground in the law of reason, Quod nihil possimus contra veritatem, (that is) wee may doe nothing against the trueth, and sith he knoweth it is trueth that the money is paied, he may do nothing against the trueth, and if he should bee of counsell with the plaintife, he must suppose and averre that it is the very due debt of the plaintife, and that the defendāt withholdeth it from him vnlawfully, which he knoweth himselfe to be vntrue: wherefore hee may not with conscience in this case be of counsell with the plaintife, knowing that the plaintife is paid alreadie, wherefore if thou bee contented with this answere, I pray thee proceed to some other question. St. I will with good will.

¶ The 7. question of the Student.

Cap. 7.

A Man maketh a feoffemēt to ꝑ vse of him & of his heirs, & after the feoffor putteth in his beasts to manure the grouñd, & the feoffee taketh thē as damages fesant, & putteth thē in pound, & the feoffor bringeth an action of trespas against him for entring into his grouñd &c. whether may any man knowing the sayde vse, be of counsell with the feoffee to auoid the action? D. May he by the common law auoid that action, seeing that the feoffor ought in conscience to haue the profits? S. Yes verily, for as to the Common Law the whole interest is in the

the feoffee, & if the feoffee will breake his conscience, and take the profits, the feoffour hath no remedy by the common Law, but is driuen in that case to sue for his remedy by Subpena for the profits, and to cause him to reenoffe him againe, & that was sometime the most common case where the Subpena was sued, that is to say, before the Statute of 18. 3. but sith the Statute, the feoffor may lawfully make a feffement. But nevertheless for the profits received, the feoffor hath yet no remedy but by Subpena as he had before the said estatute. And so the supposell of his action of trespas is vntrue in euery point, as to the common law.

D. Though the actiō be vntrue, as to the law yet he that sueth it ought in conscience to haue that he demandeth by the action, that is to say, damages for his profits, and as it seemeth no man may with conscience giue counsel, against that he knoweth conscience would haue done. St. Though conscience would he should haue the profits, yet conscience will not that for the attaining thereof the feoffour should make an vntrue surmise. Therefore against the vntrue surmise euery man may with conscience giue his counsell, for in that doing hee resisteth not the plaintife to haue the profits, but hee withstandeth him that hee should not maintaine an vntrue action for the profits. And it sufficeth not in the Law, ne yet in conscience as me seemeth, that a man hath right to that hee sueth for, but that also hee sue by a iust meanes, and that hee hath both good right, and also a good and a true countenance to come to his right: for

if

if a man haue right to lands, as heire to his father, and he will bring anaction as heire to his mother that neuer had right, euery man may giue counsel against the action, though he know hee haue right by another meanes, & so as me thinketh he may do in dilatories, whereby the partie may take hurt if it were not pleaded, though he know the plaintife haue right: as if the party or the towne be mistaken, or if the degrees in writs of Entre be mistake, but if ꝑ party should take no hurt by admitting of a dilatory, there hee that knoweth that the plaintife hath right, may not plead that dilatorie with conscience: As in a Formedon to plead in Abatement of the writ, because hee hath not made himselfe heire to him that was last seised, or in a writ of Right for that the demaundant had omitted one ꝑ tended right, ne such other, ne he may not assent to the casting of an essoin, nor protection for him, if hee know that the demandant hath right, ne hee may not vouch for him, except it be ꝑ he knoweth that the tenaunt hath a true cause of a voucher, & of lien, & that hee doth it to bring him thereto, & in like wise he may not pray in aid for him, vnles he know the prayee haue good cause of voucher & lien ouer, or that he know that the prayee hath somewhat to plead that the tenaunt may not plead, as villeine in the demandant, or such other. D. Though the plaintife hath brought an action that is vntrue & not maintenable in the Law, yet the defendant doeth wrong to the plaintife in the withholding of the profits aswell before the action brought as hanging the action, and

that

that wrong as it seemeth the counsailor doeth maintaine, & also sheweth himselfe to fauor the partie in that wrong when he giueth counsaile against the action. St. If the plaintife doe take that for a fauor & a maintenance of his wrong, he iudgeth farther than the cause is giuen, so that the counsailor doe no more but giue counsaile against the action, for though hee giue him counsaile to withstand the action for the vntruth of it, and that hee should not confesse it & to make thereby a fine to the King without cause, yet it may not stand with reason that hee may giue counsell to the partie to yeeld the profits: and therefore I thinke he may in this case be of counsaile with him at the common Law, and be against him in the Chauncerie, and in either Court giue his counsaile without any contrariolitie, or hurt of conscience. And vpon this ground it is, that a man may with good conscience bee of counsaile with him that hath Land by discent, or by discontinuance without title, if he that hath the right bring not his action according to the Law, for the recouering of his right in that behalfe.

¶ The seuenth question of the Student.

Cap. 8.

If a man take distres for debt vpon an obligation, or vpon a contract, or such other thing he hath right title to haue, but he ought not by the law to distrain for it, & neuertheles he keepeth

eth the same distresse in pound till he be paid of his duty, what restitution is he bound to make in this case? whether shall he pay ꝯ money because he is come to it by an vnlawfull meane, or onely to restore the party for the wrongfull taking of the distres, or for neither, I pray you shew me? Do What is the law in this case? S. That he that is distrained may bring a speciall action of trespasse against him ꝯ distraineth, for ꝯ he tooke his beasts wrongfully, and kept thē till he made a fine, & therfore he shal recouer the fine in damages, as he shal do for the residue of trespas: for the taking of the mony by such cōpulsion is taken in the law but as a fine wrōgfully taken, though it be his duette to haue it. D. Yet though he may so recouer, mee thinketh that as to the repaiment of the mony he is not bound thereto in conscience, so that he take no more thā of right he ought to haue, for though hee came to it by an vnlaw meane, yet when ꝯ money is paid him, it is his of right, & he is not bound to repay it, vnles it be recouered as thou saidst, & then when he hath repaied it, he is as me thinketh restored to his first action: but to the redeliuery of the beasts with such damages & such hurt as he hath by the distres, I suppose he is bound to make recōpēce of thē in cōscience without cōpulsiō or suit in the law: for though hee might lawfully haue sued for his duette in such maner as the law hath ordred, yet I agree well that he may not take vpon him to bee his owne iudge, and to come to his duety against the order of the Law, and therefore if any hurt come to the party by the disorder, he is bound to

restore

restore it. But I would think it were the more doubt if a man take such a distresse for a trespas done to him, and keepeth the distres till amends be made for the trespas: for in that case the damages be not in certain, but be arbitrable either by the assent of the parties or by 12. men: and it seemeth that there is no assent of the partie in this case, specially no free assent, for that he doth it by compulsion and to have his distres againe, and so his assent is not much to be pondered in that case, for all his assenting of him that take the distresse, and so hee hath made himselfe his owne Iudge and that is prohibited in all lawes: but in that case where the distres is taken for debt, he is not his own iudge for the debt was iudged in certaine before by the first contract, and therefore some thinke great diuersitie betwixt the cases. St. By that reason it seemeth, that if hee that distraineth in the first case for the debt take any thing for his damages, that he is bound in conscience to restore it againe, for damages be arbitrable, and not certaine no more than trespas is, & me seemeth that both in the case of trespas and debt, he is bound in conscience to restore that he taketh, for though he ought in right to have like sum as he receiueth, yet hee ought not to have the money that he receiueth, for he came to the money by an vniust meanes, wherefore it seemeth he ought to restore it againe. D. And if hee should bee compelled to restore it againe, should hee not yet (for that he receiued it once) bee barred of his first action notwithstanding the paiment?

S. I will not at this time cleerely assoile thee that question, but this I will say, that if any hurt come to him thereby, it is through his owne default, for that he would do against the law: but neuertheless a little I will say to thy question, that as mee seemeth when hee hath repayd the mony, that he is restored to his first action. As if a man condemned in an actiõ of trespas pay the money, and after the defendant reuerse the iudgement by a writ of Errour, and haue his money repaid, then the plaintife is restored to his first action. And therefore if he that in this case tooke the mony, restore that he tooke by the wrongfull distresse, or that he ordered the matter so liberally, that the other murmure not, ne complaine not at it, me seemeth he did very wel to be sure in conscience: and therefore I would aduise euerie man to bee well ware how he distraineth in such cases against the law. D. Thy counsel is good, & I note much in this case that the party may haue an actiõ of trespas against him that distraineth, so that hee is taken in the law but as a wrong doer, & therfore to pay the mony againe is the sure way, as thou hast said before. And I pray thee now shew me for what a man may lawfully distrain as thou thinkest.

¶ For what thing a man may lawfully distraine.

Cap. 9.

A Man may lawfully distraine for a Rent seruice, and for all maner of seruices, as homage,

mage, Fealtie, Elcuage, suit of Court relefes, and such other. Also for a rent reserued vpon a gift in taile, a leale for terme of life, for yeres, or at will, if he reserue the reuersion, the feoffor shall distraine of common right, though there bee no distresse spoken of. But in case a man make a feoffement and that in fee by Indenture, reseruing a rent, he shall not distraine for that rent vnlesse a distresse be expressly reserued: and if the feoffement bee made without a deede reseruing a rent, that reseruation is void in Law, and hee shall haue the rent onely in conscience, and shall not distraine for it. And like Law is where a gift in taple or a Leale for terme of life is made, the remainder ouer in fee reseruing a rent, that reseruation is void in law.

Also if a man seised of land for terme of life graunteth away his whole estate, reseruing a rent, that reseruation is void in the Law, without it be by Indenture, and if it be by Indenture, yet hee shall not distraine for the rent but a distresse bee reserued Also for Amerciament in a Leete, the Lord shall distraine. But for Amerciament in a Court baron he shal not distraine.

Also if a man make a leale at Michaelmas for a yeare, reseruing a rent payable at the feast of the Annuntiation of our Lady and Saint Mich. the Archangell, in that case hee shall distraine for the rent due at our Lady day, but not for the rent due at Michelmas, because the terme is expired.

But if a man make a Leale at the feast of

Christmas for to endure to the feast of Christmas next following, that is to say, for a yeare reseruing a rent at the foresaid Feast of the Annuntiation of our Ladie and Saint Michael the Archangell, there hee shall distraine for both the rents, as long as the terme continued, that is to say, till the foresaid Feast of Christmas.

And if a man haue Land for terme of life of John at Noke, and maketh a lease for terme of yeares reseruing a rent, the rent is behind, and John at Noke dieth, there he shall not distrain because his reuersion is determined.

Also if he to whois vse seffes bin seised maketh a lease for terme of yeares, or for terme of life, or a gift in tatle reseruing a rent, there the reseruation is good and the lessour shall distraine.

And if a townehip be amerced & the neighbours by assent assesse a certaine summe vpon euery inhabitant, & agree that if it be not paid by such a day, that certaine persons thereto assigned shall distraine: In this case the distres is lawful. If Lord and Tenant bee, and if the tenant do hold of the Lord by fealtie and rent, and the Lord doth graunt away the fealtie reseruing the rent, and the tenaunt attourneth in this case, hee that was Lord may not distraine for the rent, for it is become a rent seeke. But if a man make a gift in tayle to another, reseruing fealtie & certaine rent, and after that hee graunteth away the fealtie reseruing the rent and the reuersion to himselfe, in this case hee shall distraine for the rent, for the graunt of the fealtie

fealtie is bolde, for the fealtie cannot bee seuered from the reuertion. Also for heriot seruice the Lord shall distraine, and for heriot custome he shall seise and not distraine. Also if a rent be assigned to make a partition or assignement of Dower egall, hee or shee to whom the rent is assigned may distraine: and in all these cases aboue said, where a man may distraine, hee may not distraine in the night, but for damages feasant, that is to say, where beasts doe hurt in his ground he may distrain in the night. Also for waskes, for reparations, for accompts, for debts vpon contracts, or such other, no man may lawfully distraine.

¶ The 8. question of the Student.

Cap. 10.

IF a man doe trespasse, and after make his executors, and die before any amends made; whether be his executors bound in conscience to make amends for the trespasse if they haue sufficient goods thereto, though there be no remeddy against them by the law to compel them to it? Doct. It is no doubt but they are bound thereto in conscience, before any other deed in charitie, that they may do for him of their owne deuotion. St. Then would I wit, if the testatour made Legacies by his will, whether the executors be bound to doe first, that is to say, to make amends for the trespasse, or to pay the Legacies, in case they haue no goods to doe both? D. To pay legacies: for if they should first

make recompence for the Trespasse and then haue not sufficient to pay the Legacies, they should be taken in the law as wasters of their testators goods: for they were not compellable by no law to make amends for the trespas, because euery trespas dyeth with the person, but the legacies they should bee compelled by the Law spirituall to fulfill, and so they should bee compelled to pay the Legacies of their owne goods, and they shall not be compelled thereto by no law ne conscience: but if the case were that he ne had ne sufficient goods to doe both, then me thinketh they be bound to do both, and that they be bound to make amends for the Trespasse, before they may doo any other charitable deed for the Testator of their owne mind, as I haue said before, except the funeral expences that be necessary, which must be allowed before all other things. S. And what the prooning of the Testament.

D. The Ordinary may nothing take by cõscience therfore, if there be not sufficient goods besides for the funerals, to pay the debts, & to make restitution. And in likewise the Executors be bound, to pay debts vpon a simple contract, before any other deed of charitie, that they may doe for their Testator of there owne deuotion, though they shall not bee compelled thereto by the Law &c. And whether thinkest thou that they bee bound to doe first, that is to say, to make amends for the trespas, or to pay the debts vpon a simple contract. Do To pay the debts, for that is certaine and the trespasse is arbitrable.

S. Then

S. Then for the plainer declaration of this matter and other like, I pray thee shew me thy mind, by what law it is, that if a man make executours, and that the executours, if they take vpon them, be bound to performe the will, and dispose the goods that remaine for the Testatour. D. I thinke that it is best by the law of reason. S. And me thinketh that it should bee rather by the custome of the Realme. D. In all Countries and in all lands they make Executors. S. That seemeth to be rather by a generall custome, after that the law and custome of property was brought in, than by the law of reason: for as long as all things were in common, there were no executours ne wils, ne they nee-ded not them, and when property was after brought in, me thinketh that yet making of executors, and disposing of goods by will, after a mans death, followeth not necessarily thereupō: for it might haue bin made for a law, that a mā should haue had the property of his goods onely during his life, & that then his debts payed, all his goods to haue beene left to his wife and children, or next of his kin, without any legacies making thereof, and so might it now bee ordained by statute, and the statute good & not against reason: wherefore it appeareth that executors haue no authoritie by the Law of reason, but by the Law of man. And by the old Law and custome of the Realme a man may make executors and dispose his goods by his will, and then his executors shall haue the execution thereof, and his heires shall haue nothing, but if any particuler custome helpe: and

the executors shall also haue the whole possession, and disposition of all his goods & chattels as well reall as personal, though no word be expressly spoken in the will, that they shall haue them: and they shall haue also actions to recouer all debts due to ỹ testator, though all debts & legacies of the testator be paid before, & shall haue the disposition of them to the vse of the testator, & not to their own vse: and so me thinketh that the authority to make executors, and that they shall dispose the goods for the testators is by the custome of the Realme: but then I thinke as thou saiest, that by the Law of God they shall be bound to doe the first, that is to the most profit of the soule of their testatour where the disposition thereof is left to their discretion, and that I agree well, is to pay debts vpon contracts, & to make amends for wrong done to ỹ testator, though they bee not cõpelled thereto by the law & custome of the realme, if there be none other debt nor legacie that they be bound to pay by the law: but if two seuerall debts be payable by the Law, then which debt they shal do first in conscience, I am somewhat in doubt. D. Let vs first know what the common law is therein. S. The common law is, ỹ if the Testator owe a.l. to two men severally by Obligation, or by such other maner that an action lyeth against his Executors thereof by the Law, and hee leaueth goods to pay the one and not both, that in that case hee that can first obtaine his Iudgement against the Executours, shall haue execution of the whole, and the other shall haue nothing, but to which of them

them he shall in conscience owe his favour, the common Law teacheth not. D. Therein must be considered the cause why the debts began, & then he must after conscience, beare his lawfull favour to him þ hath the clerest cause of debt, and if both have like cause, then in conscience he must beare his favour where is most necde and greatest charitie.

St. May the executors in that case delay that action that is first taken, if it stand not with so good conscience to bee paied, as another debt whereof no action is brought, and procure that an action may be brought thereof, and then to confesse that action, that he may so have execution, and then the executors to be discharged against the other? D. Why may he not in that case pay that other without action, and so bee discharged in the law against the first?

Stu. Verily, for after an action is taken, the executor may not minister the goods so, but that hee leave so much as shall pay the debt, whereof the action is taken: and if he doe not, hee shall pay it of his owne goods, except another recover, and have Judgement against him hanging that action, and that without coulin.

D. Then to answer to thy question, I thinke that by delates that be lawfull, as by Essoine, Emparlance, or by dilatorie plee in abatement of the writ that is true, he may delay it: but he may plead no untrue plee to preferre the other to his dueti. But I pray thee, what is the law of legacies, restitution, & debts, upon contracts, that perteine ought rather after charitie

to

to be paid than a debt vpon an obligation, what may the fauor of the Executo doe in these cases? S. Nothing, for they either performe legacies, make restitutions, or pay debts vpon contracts, and keepe not sufficient to pay debts which they are compellable by the law to pay, that shalbe taken as a Deuastauerunt bona testatores, that is to say, That they haue wasted the goods of their testator: and therefore they shalbe compelled to pay the debts of their own goods: so it is if they pay a debt vpon an obligation, whereof the day is yet to come, though it be the cleere debt, and that be the more charitie to haue it paid. D. Yet in that case if hee to whom the debt is already owing, forbeere till after the day of the other obligation is past, then he may pay him without danger. S. That is true, if there be no action taken vpon it, and though there be, yet if that action may bee delayed by lawfull meanes, as thou hast spoken of before, till after the day, and that an action is taken vpon it, then may the executors confesse the action, and then after Iudgement hee may pay the debt without danger of the law. D. Is not that confession of the action so done of purpose, a couin in the law? S. No verily, for couin is where the action is vntrue, & not where the Executors beare a lawfull fauor. Do. The Ordinarie vpon the accompt in all the case before rehearsed, will regard much what is best for the Testator. St. But hee may not drive them to accompt against the order of the common Law.

The

¶ The 9. question of the Student.

Cap. 11.

A Man is indebted to another vpō a simple contract in 20. l. & he maketh his will & bequeatheth 20. l. to ỹ Hart & dyeth, and leaueth goods to his executors only to burie him with, and to performe the said legacie, and after the said executors deliuer the goods of their Testatour in performance of the sayd bequest: whether is hee to whom the bequeast is made, bound in conscience to pay the said debt vpon the simple contract, or not? D. Is hee not bound thereto by the Law? S. No verily. D. And what thinkest thou hee is in conscience? S. I thinke that he is not bound thereto in conscience, for hee is neither Ordinarie, Administratour, nor Executour. And I haue not heard that any man is bound to pay debts of any man that is deceased, but hee be one of those three: for the goods that the testator left to the executours were neuer charged with the debt, but the person of the Testatour while he liued was onely charged with the debt, and not his goods, and his executors that represent his estate after his death, hauing goods thereto of the testators, be charged also with the debts, and not the goods. And therefore if an Executor giue away or sell all the goods of the Testatour, or otherwise waste them, hee that hath the goods is not charged with the debts in Law nor conscience, but the Executor shall bee charged of his owne goods

goods. And in likewise if Jo.at Moke owe to A.B. xx.l. and A.B. oweth to C.D. xx.l. and after A. B. dyeth intestate hauing none other goods but the said xx. l. which the said John at Moke oweth him, yet the said C. D. shall haue no remedie against the said Jo.at Moke, for he standeth not charged to him in Law nor conscience. But the Ordinarie in this case must commit Administration of the goods of the sayd A. B. And the said Administrator must leuy the mony of the said John at Moke, and pay it to the said C.D. and the said John at Moke shall not pay it himselfe, because hee is not charged therewith to him: and no more mee thinketh in this case, that he to whom the bequest is made, is neither charged to him that the money was owing to, in the Law or conscience. Do. Then shew mee thy mind by what law it was grounded as thou thinkest þ Executors be bound to pay debts before legacies: whether it is by the law of God, or by the law of reason, or by the Law of man, as thou thinkest? S. I thinke that it is both by the law of reason, & by the law of God: for reason will that they shal doe first that is best for the testator, and that is to pay debts that their testator is bound to pay, before legacies, that hee is not bound to. And also by the law of God, they are bound to pay the debts first: for such they are bound by the law of God to loue their neighbour, they are bound to do for him that shall be best for him, when they haue taken the charge thereto, as Executors doe when they agree to take the charge of the will of their Testatour

vpon

vpon them: and it is better for the testator that his debts be paid (wherefore his soule shal suffer paine) than that his legacies be performed, wherefore hee shall suffer no paine for the performing of them.

And that is to bee vnderstood, where the legacie is made of his own frée will, & not where it is made as a satisfaction of any dutie. And after the saying of S. Gregorie, the verie true proofe of loue is the deed. But this man is not in that case, for he tooke neuer the charge vpon him to pay the debts of the Testatour, and therefore he is not bound to them in Law nor conscience as me seemeth: But rather the executors should haue bin ware ere they had paid the legacies, seeing there were debts to pay.

D. The Executors might no otherwise haue done in this case, but to pay the Legacies: for thē they should haue bēn cōpelled by the Law to haue paid, and so they could not haue bin to haue paid the debt vpon a contract, and therefore they did well in performing of that legacy but hee to whom the legacie was made ought not to haue taken them, but ought in conscience to haue suffered them, to haue gone to the payment of the debt, and sith he did not so, but tooke them where he had no right to them, it seemeth that when hee tooke them, he tooke with them the charge in conscience to pay the debt: for sith the executors were compellable by the Law to performe that bequest and not pay the debt, therefore when they performed that bequest, they were discharged thereby against him that the debt was owing to, in the Law and conscience

science, and then the charge resteth vpon him that tooke the goods where he ought not in cõscience to haue taken them: but if it had been a debt vpon an Obligation, or such other debt, whereupon remedie hath been had against the executors by the law, I there suppose though that the executors had performed the Legacie, that yet he to whom the legacie was made and performed, had not beene charged in conscience to the payment of the debt, for the Executours stood still charged thereto of their own goods: and hee to whom the bequest was made was only bound in cõscience to repay that hee receiued to the Executors, because he had no right to haue receiued it, for against the Executors he had no right thereto. Sen. Then it seemeth in this case that in likewise he to whom the bequest was made, should repay that hee receiued to the Executours, and then they to pay it rather then hee. D. The executors haue no farther medling with it as this case is, for when they performed the bequest, they were discharged against both the other in Law and conscience, & also he to whom the bequest was made, stood not in this case charged to the executors: for against them he had good title by the Law, and so this charge standeth onely against him that the debt is owing to: and the same Law that is in this case vpon a debt vpon a contract is if the testator had done a trespasse whereupon he ought to haue made restitution, that is to say, that hee to whom the bequest is made, is bound to make the amends for the Trespasse: for it should bee no discharge to him to

pay

pay it againe to the Executours without they paid it ouer, & it were vncertaine to him whether they should pay it or not.

And therefore to be out of perill, it is necessarie that he pay it himselfe, and then he is surely discharged against all men.

¶ The 10. question of the Student.

Cap. 12.

A Man seised of certain lād in his demesne as of fee, hath issue two sonnes and dieth seised, after whose death a straunger abateth, & taketh the profit, and after the eldest sonne dyeth without issue, and his brother bringeth an Assise of Mortdaunceſtar as sonne and heire to his father, not making mention of his brother, and recouereth the Land with damages from the death of his father, as he may well by the Law: whether in this case is the younger brother bound in conicience, to pay to the Executours of the eldest brother, the value of the profits of the said Land, that belonged to the eldest brother in his life, or not? Doct. What is thine opinion therein? S. That like as the sayd profits belonged of right to the eldest brother in his life, and that hee had full authoritie to haue released aswel the right of the said Land, as of the said profits, which release should haue beene a cleere barre to the yonger brother for euer: That the right of the said dammages

which

which bee in the Law but a chattell, belong to his executors and not to the heire: for no manner of chattell neither reall nor personall shall not after the law of the realm descend vnto the heire.

D. Thou saidst in the case next before, that it is not of the Law of reason, that a man shall make executors, & dispose of his goods by his will, & ỹ the executors shall haue ỹ goods to dispose, but by the law of man: And if it be left to the determination of the law of man, That in such cases as the law giueth such chattels vnto the Executors, they shall haue good right vnto them, and in such cases as the Law taketh such chattels from them, they beene rightfully taken from them: And therefore it is thought by many, that if a man sue a Writ of right of Ward of a Ward that her hath by his owne fee, and dieth hanging the writ, and his heire sue a Resummons according to the stat. of West. 2. and recouereth: that in that case the heire shall enioy the wardship against the executors, and yet it is but a chattell: and they take the reason to bee, because of the sayde statute, and so might it bee ordained by statute that all wards should go to the heires, and not to the Executors: Right so in this case, sith the Law is such, that the ponger brother shall in this case haue an Assise of Mordaunceſtour as heire to his father, not making any mention of his elder brother, and recouer damages aswel in the time of his brother, as in his own time: It appeareth that the Law giueth the right of these damages to the heire, and therefore

for no recompence ought to bee made to the executors, as me seemeth: but it is not like to a writ of Riel, where as I haue learned in latine (sith our first dialogue) the demandant shall recouer dammages only from the death of his father, if he ouerliue the Riel: the cause is, for that the demaundant, though his Riel ouerliued his father. must of necessity make his conueyance by his father, and must make himselfe son & heire to his father, & cosin and heire to his Riel: and therefore in that case if the father ouerliued the Riel, the abator were bounden in conscience to restore to ye executors of the father the profits run in his time (for no Law taketh them from him) but otherwise it is in this case, as me seemeth. St. If the ponger brother in this case had entred into the land without taking any assise of Mordancester as he might if hee would. to whom were the abator then bounden to make restitution for those profits as thou thinkest? D. To the executors of the eldest brother: or in that case there is no law that taketh them from them, & therefore the generall ground, which is that all chattels shall goe to the executors, holdeth in that case: but in this case that ground is broken and holdeth not, for the reason that I haue made before. For commonly there is no generall ground in the Law so sure, but it faileth in some particuler case.

¶ The 11. question of the Student.

Cap. 13.

A Man seised of land in fee, taketh a wife, and after alieneth the land, & dyeth, after whose

death his wife asketh her dower, & the alienee refuseth to assigne it vnto her, but after she asketh her Dower again, and he assigneth it vnto her: whether is the alienée in this case bound in conscience, to giue the womã damages for the profits for the Land after the third part, from the death of her husband, or from the first request of her Dower, or neither the one nor the other? D. What is the law in this case? Stu. By the law the woman shall recouer no damages, for at the Common law the demaundant in a Writ of Dower, should neuer haue recouered damages: but by the Statute of Merton it is ordeined, that where the husband dieth seised, that the woman shall recouer damages, which is vnderstood the profits of the Land sith the death of her husband, and such damages as she hath by the forbearing of it: but in this case the husband died not seised, wherefore she shall recouer no damages by the Law. D. Yet the Law is, that immediatly after the death of her husband the Wife ought of right to haue her dower if shee aske it, though her husbãd die not seised. S. That is true.

Do. And sith shee ought to haue her Dower from the death of her husband, it seemeth that shee ought in conscience to haue also the profits from the death of her husband, though shee haue no remedie to come to them by the Law: For mee thinketh that this case is like to a case that thou puttest in our first Dialogue in Latin, the 17. Chapter: That if a tenant for terme of life be disseised and dye, and the disseisor dyeth, and his heire entreth and taketh the profits,

fees, and after he in the reuersiõ recouereth the lands against the heire, as hee ought to doe by the Law, that in that case hee shall recouer no damages by the Law: and yet thou diddest agree, that in that case the heire is bound in cõscience to pay the damages to the demaundant, and so mee thinketh in that case, that the feoffee ought in conscience to pay the dammages from the death of her husband, seeing that immediatly after his death she ought to haue her dower. St. Though she ought to bee indowed immediately after the death of her husband, yet shee can lay no default in the feoffee till shee demand her dower vpõ the ground, and that the tenent be not there to assign it, or if he be there that he will not assigne it: for hee that hath the possession of land whereunto any woman hath title of dower, hath good authority as against her to take the profits till she require her dower for euerie woman that demaundeth dower affirmeth the possession of the tenant as against her: and therefore although she recouer by action, shee leaueth the reuersion alway in him against whom she recouereth, though he be a disseisor, and bringeth not the reuersion by her recouerie to him that hath right as other tenãts for terme of life doe. And for this reason it is that the tenaunt in a Writ of Dower, where the husband died seised, if hee appeare the first day, may say to excuse himselfe of dammages that hee is and all times hath beene readie to yeld Dower if it had been demaunded: and so he shall not be received to do in a Writ of Cessauit, neither in the case that thou remembrest

abone, for in both cases the tenãts be supposed by the Writ to bee wrong doers: but it is not so in this case, & so me thinketh it clear that the feffée in this case shall neuer be bound by law, nor conscièce to pæid dammages for the time ꝑ passed before the request, but for the time after the request is greater doubt: howbeit some think him there not bound to pæid damages, because his title is good, as is said before, & that it is her default that she brought not her action D. Vnto the time before the request I hold me content with thine opinion, so that he assign the dower when he is required, but when hee refuseth to assigne it, then I thinke him bound in conscience to peeid damages for both times, though she shall none recouer by the law And first as for the time after the refusall, it appeareth euidently that when hee denied to assigne her dower, he did against conscience: for he did not ꝑ he ought to haue done by the law, ne as he would should haue bin done to him, & so after ꝑ request he holdeth her dower from her wrongfully, and ought in conscience to pæid damages therfore. And as to ꝑ default that thou assignest in her, that she take not her actiõ, ꝑ forceth little, for actiõs need not, but where the party will not do that he ought to do of right. And for that he ought of right to haue done & did it not, hee can take no aduantage: and then as to the damages before the request, me thinketh him also bounden to pay them. for when he was required to assigne dower & refused, It appeareth that he neuer intended to peeid dower from the beginning, & so he is a wrong doer in his own

conscience: & moreouer if the husbād die seised, the law is such, that if the tenaunt refuse to assigne dower when he is required, wherfore the womā bringeth a writ of dower against him, that in ỹ case the woman shal recouer damages aswel for ỹ time before ỹ request as after: & yet he ought not in that case after thine opinion to haue pleded any maner of damages if hee had bin ready to assign dower when it was demāded, as some thinketh here. St. The cause in the case that thou hast put, is for that the statute is general that the demandāt shal recouer damages, where ỹ husbād died seised, & that statute hath bin alway construed, ỹ where the tenant may not say, ỹ hee is, & hath bin ready alway to yeeld dower &c. ỹ the demandaunt shall recouer damages from the death of her husband. But in that case there is no law of the realme, ỹ helpeth for the demandāt neither cōmon law, nor statute: & furthermore though it might be proued by his refusal, ỹ he neuer intēded from the death of the husband to assigne her dower, yet that proueth not, but that he had good right to take the profits of her third part for the time, aswell as he had of his owne two parts, till request be made, as is aforesaid: & some thinketh ỹ notwithstanding the dentall, he is not bound to yeeld damages in this case, but for the time of the request, & not for the time before. D. For this time I am content with thy reason.

¶ The 12. question of the student.

Cap. 14.

A Man seised of certain lāds, knowing that another hath good right & title to them, let-

lieth a fine with Proclamation, to the intent hee would extinct the right of the other man, & the other man maketh no claime within the v. yeares, whether may hee that leuied the fine hold the land in conscience as he may do by the law? D. By this question it seemeth that thou doest agree, that if he that leuyed the Fine had no knowledge of the other mans right, that his right should then bee extincted by the fine in conscience. S. Yea verily, for thou biddest shew a reasonable cause why it should bee so in our first Dialogue in Latine the 24. Chapter, as there appeareth. But if he that leuied a fine and that would extinct the right of another, knew that the other had more right than hee, then I doubt therein: for I take thine opinion in our first Dialogue to bee vnderstood in conscience, where he that would extinct former rights by such a fine with proclamatiō, knoweth not of any former title, but for his more surety, if any such former right be, he taketh the remedy that is ordained by the law. Do. Whether doest thou meane in this case that thou puttest now that hee that hath right, knoweth of the fine, wilfully letting the fiue yeares passe without claime, or that hee knoweth not any thing of the fine.

S. I pray thee let mee know thine opinion in both cases, and whether thou thinke that hee that hath right bee barred in either of the said cases by conscience as he is by the Law, or not. Do. I will with good will hereafter shew thee my mind therein: but at this time I pray thee giue a little sparing and proceed

now

now for this time to some other question.

¶ The 13 question of the Student.

Cap. 15.

A Man seised of certain lands in fee hath a daughter, which is his heire apparāt, the daughter taketh a husband, & they have issue, the father dieth seised, and the husband as soone as he heareth of his death, goeth toward the land to take possession, & before he cā come there, his wife dieth, whether ought he to have the lād in conscience for term of his life, as tenāt by the curtesie, because he hath done that in him was to have had possess. in his wifes life, so that hee might have bin tenant by the curtesie according to the Law, or that he shall neither have it by the law, nor conscience? D. Is it cleerely holden in the law that he shall not be tenant by the curtesie in this case, because hee had not possession in deed?

S. Ye verily, and yet upon a possession in law a woman shal have her dower, but no man shal be tenant by the curtesie of Land, without his wife have possession in deed. D. A man shall be tenāt by the curtesie of a rent though his wife dye before the day of payment, & in likewise of an Annuision though she die before the annuy-dance. S. That is truth for the old custome and Maxime of the law is, that he shal be so, but of land there is no Maxime that serueth him but his wife have possession in deed. D. And what is the reason that there is such a maxime in the

law of the rent & of the aduowson, neither the of land when the husband doth as much as in him is to haue possession and cannot? A. Some assign the reason to be because it is impossible to haue possession in deed of the rent, or of aduowson before the day of payment of the rent, or before ỹ auoidance of the aduowson. D. And so it is impossible that he should haue possession in deed of Land if his wife dye so soone that he may not by possibilitie come to the Land after his fathers death, & in her life as the case is. A. The law is such as I haue shewed thee before & I take the verie cause to be, for that there is a Maxime certeyn for the rent and the aduowson, & not for the lands as I haue said before, & as is said in the 8. chapter of our first Dialogue, it is not alway necessarie to assigne a reason or consideration why the Maximes of the law of England were first ordeined & admitted for Maximes, but it sufficeth that they haue bin alway taken for law, and that they be neither contrarie to the law of reason, nor to ỹ law of God as this Maxime is not, & therfore if the husband in this case be not holpen by cõscience, he cannot be holpen by the law. D. And if the law helpe him not, conscience cannot help him in this case, for conscience must alway bee grounded vpon some law, and it cannot in this case be grounded vpon the Law of reason, nor vpon the law of God, for it is not directly by those lawes that a man shall be tenant by curtesie, but by the custome of the realme. And therfore if the custom help him not, he can nothing haue in this case by conscience: for conscience

neuer

neuer resisteth the law of man, nor addeth nothing to it, but where ꝑ law of man is in it self directly against the Law of reason, or else the Law of God, and then properly it cannot bee called a law, but a corruption, or where the generall grounds of the law of man worketh in any particuler case against the said Lawes as it may doe, & yet the law good, as it appeareth in diuers places in our first dialogue in Latin, or els, wher there is no law of mā prouided for him that hath right to a thing by ꝑ law of reason, or by the law of God. And then sometime there is remedie giuen to execute that in conscience, as by a Subpena, but not in all cases: for sometime it shal be referred to the conscience of the party, & vpon this ground (that is to say) that when there is no title giuen by the common Law, that there is no title by conscience: There be diuers other cases, whereof I shall put some for an example. As if a Reuersion be granted vnto one, but there is no attornement: or if a new rent bee granted by word without deed, there is no remedie by conscience, vnlesse the said grants were made vpon consideration of money, or such other. And in likewise where he that is seised of lands in Fee simple maketh a will thereof, that will is void in conscience, because the ground serueth not for him whereby the conscience should take effect, that is to say, the law. And if the tenant make a Feoffement of the land that he holdeth by priorite, & taketh estate againe, and dieth (his heire within age) the Lord of whom the land was first holde by priorite, shall haue no remedie, for the bodie by con-

cõscience, for the law that first was with him, is now against him, & therfore conscience is altered in likewise as the law altereth. And diuers and many cases like be in the Law that were too long to rehearse now. And thus me thinketh that if the Law be as thou sayest, the husband in this case hath neither right by the Law, nor conscience.

¶ The 14. question of the Student.

Cap. 16.

A Rent is grãted to a mã in fee to pertaine of two acres of lãd, & after the grãtor enfeoffeth the graunte of one of the said acres, whether is the whole rent extinct thereby in cõscience as it is in the law? D. This case is somewhat vncertain: for it appeareth not whether the grantor enfeoffed him on trust, or that he gaue the acre to him of his mere motion, to the vse of the said feoffee, or elis that the feoffement was made vpon a bargaine, & if it were but only a feoffement of trust, then I think the whole rent abideth in conscience though it bee extinct in the Law: & first that it continueth in that case in conscience, for the part that the grantee hath to the vse of the grantor it is euident, for he may not take the profits of the lãd, and it is against conscience that he should leese both, & in likewise it abideth in conscience for the acre that remaineth in the hãds of the grãtor, though it be extinct in the Law: For there was a default in the graunter that hee would make the feffemẽt to the grãtee, aswel as there

was

was in the grantee to take it. And it is no conscience that of his owne default he should take so great auaile to be discharged of the whole rent, seeing that the feoffement was made to his own vse. And if the feoffement were made vpon a bargaine & a contract betweene them, then it is to see whether they remembred the rent in their bargaine, or that they remembred it not, & if they remembred it in their bargain & contract, then conscience must follow the bargaine: As thus, if they agreed that the Grauntee should haue the rent after the portiō in the other acre, then by conscience hee ought to haue it though it be extinct in the law: And if they agreed that the whole rent should be extinct, and made their price according, then it is extinct in law & conscience: & if they clerely forgot it & made no mention of it, or for lacke of cunning take the Law to be, that it should continue in the other acre after the portion, and made their price according, pondering onely the value of the acre that was sold, then mee thinketh it doth continue in conscience after the portiō: & if the feoffement were made to the vse of the grantee, then it seemeth the whole rent is extinct in law and conscience. S. Then take this to be the case, that is to say, that the feoffement was made to the vse of the grantee. D. What is thē thine opinō therein? S. That the rent should abide in conscience after the portion of the acre remaining in the hands of the grātor, notwithstanding it be extinct in the law. D. Then shew me thine opinō in this that I shal aske thee: Of what law is it that graunts of rent and of such other

profits out of lãds may be made, and that they shalbe good & effectual to the grãtees. whether it is by the law of reason, or by the law of god, or by the custom & law of the realm. S. I thinke it is by the law of reason: for by ꝑ same reason that a mã may giue away all his lãds, he may as it seemeth giue away the profits thereof, or graunt a rent out of the land if he will. D. But then by what Law is it that a man may giue away his lãds? I trow by none other law but by the custome of the realme, for by statute all alienations & grants of lands may be prohibited, & then that reason proueth not that grants of the profits of lãd or a rent, should be good because hee may alien the lãd: if alienation of Land be by custome & not by the Law of reason, as I suppose it is, whereof I haue touched somewhat in our first Dialogue in Latin the 19. Chapter. And also if Graunts should haue their effect by the Law of Reason, then Reason would they should be good by the only word of the Grauntor, as well as by his deed. And that is not so, for without deed the graunt of rent is void in law: and so me thinketh that graunts haue their effects only by the Law of the Realme. Stu. Admit it be so, what meanest thou thereby? Do. I shall shew thee hereafter, as I shal shew thee the cause why I think the rent is extinct in conscience, as well as in law. And first as I take it, the reason why it is extinct in the law, is because the rent by the first grant was going out of both acres, and was not going part out of the one acre, & part out of the other, but the whole rent was going out

of

of both, and then when the grantee of his owne folly will take estate in the one acre, whereby that acre is discharged, then the other acre also must be discharged, vnles it should be apportioned, and the law will not that any apportionmēt should be in that case, but rather insomuch as the party hath by his owne act discharged the one acre, the law discharged also the other, rather than to suffer the other acre to be charged contrarie to the forme of the graunt: For this rent beginneth all by the act of the partie. And as I haue heard it is called, a rent against common right. Wherefore it is not fauored in the law, as a rent service is: and then me thinketh that for as much as it is not grounded by the law of reason, that grants of rent should be made out of Land, but by custome and law of the realm, as I haue said before: that so in like wise it remaineth to the law & custome of the realme, to determine how long such rents shall continue. And when the law iudgeth such rent to bee voide, I suppose that so doth conscience also, except the iudgement of the law be against the law of Reason or the law of God, as it is not in this case. For in this case he that taketh the feoffement hath profit by the feoffement, & knoweth that he hath such a rent out of the lād & that this purchase should extinct it, whereby it appeareth that hee assenteth vnto the Law, whereto he was not compelled, and that is his owne act and his owne default so to do, which shal extinct his whole rēt aswell in conscience as in law. But if he haue no profit of the Lād, or be ignorant that hee hath such a rent out of

the

the land, which is called ignorance of the deed or if hee bee ignorant that the Law would extinct his whole rent thereby, which is called ignorance of the Law, then mee thinketh it remaineth in conscience after the portion. St. Ignorance of the law or of ꝑ deed helpeth not but in few cases in the Law of England. D. And therfore it must be reformed by conscience, that is to say, by the law of reason, for when the generall Maxims of the law be in any particuler cases against ꝑ law of reason, as this Maxime seemeth to bee, because it excepteth not thē that be ignorant though it be an ignorance inuincible, then doth it not agree with the law of reason. S. Me thinketh that ignorance in this case helpeth little: For when a man bupeth any lād or taketh it of the gift of any other, hee taketh it at his perill, so that if the title be not good ignorance cannot help, for the buyer must beware what hee bupeth: & so in this case if the taking of an acre should extinct the whole rent in conscience, if hee were not ignorant, so mee thinketh it should in likewise extinct it also though he be ignorant of the law or of the deed: for euery man must be compelled to take notice of his owne title, and out of what land his rent is going, & so me thinketh ignorance is but little to be considered in this case. D. If a man buy lād or taketh it of gift of another, it is reason that he take it with the peril, though hee bee ignorant that another hath right: for it were not standing with reason that his ignorance should extinct the right of another, but in this case there is no doubt of the right of the land:

but

but all the doubt is how the rent shal be ordred in conscience, if he that hath the rent take part of the land: & therein is great diuersity betweene him that is ignorant in the Law, and him that knoweth the Law, & knoweth wel also that he hath a rent out of the Land, and other. For I put case that hee asked counsaile of the graunter himselfe therein, & he saying as he thought, told him that the taking of the one acre should not extinct the rent but for the portiõ, and so he thinketh the Law to be, tooke the other acre of his gift: Is it not reasonable in that case, that the ignorance should saue the Rent in conscience? St. Yes, for there the graunter himselfe is party to his ignorance, and in maner the cause thereof. D. And me thinketh all is one, if any other had shewed him so, or if he asked no counsaile at all, for mee thinketh it sufficeth in this case that he bee ignorant of the Law: for why, it is more hard in this case to proone the Rent should be extinct in conscience, though he knew it should be extinct in the Law, than to proue that it continueth in conscience after the portion if he be ignorant, and thou thy selfe were of the same opinion, as it appeareth in the beginning of this present Chapter: But if the opinion were true, it would be hard to proue but that the said generall Maxime were wholy against reason, and then it were void, but I haue sufficiently answered thereto as mee seemeth, & that it is extinct in the law, and also in conscience, except ignorance help it to be apportioned And moreouer, forasmuch as apportionment is suffered in the Law, where part of the land discen-

discendeth to the grantee, because no default cā be assigned in him: some thinke no default can be assigned in him in conscience, when he is ignorant of the Law or of the deede, though such ignorance do not excuse in the law of the realm Sr. I am content with thy opinion in this behalfe at this time.

¶ The 15. question of the Student.

Cap. 17.

A Man granteth a Rent charge out of two acres of land, and after the grauntor infeoffeth H. H in one of the said two acres to the vse of the said H. H. and of his heires, & after the said H. Hart, intending to extinct all the rent, causeth the said acre to be recouered against him to his owne vse in a writ of Entry in le Post in the name of the grauntee and of others after the common course, the grauntee not knowing of it, and by force of the said recouerie the other demaundants enter and die ipsing the grauntee, so that the grauntor is seised of all by the survivor to the vse of the said H. H. whether is the said rent extinct in conscience in part, or in all, or no part? D. I am in doubt of the law in this case. S. In what point? Do. Whether the whole rent be going out of the acre that remaineth in the hands of the grauntor, because the grauntee commeth to the Land by way of recouerie, or that it shal be extinct in law but after the portion, because the grauntee hath not the acre to his owne vse, or that the whole

whole rent shall be extinct in the Law. S. The rent cānot be whole going out of the acre that the grauntour hath: for this recouerie is vpon a feined title, and the grauntour because he is straunge to it shall be wel receiued to falsifie it. But if the Recouerie had been vpon a true title, then it had bene as thou sayst, if the grauntee recouer the one acre against the grauntour vpon a true title, the grauntour shall pay the whole rent out of the Land that remaineth in his hand: and as to the vse it maketh no matter to the grauntor as to the law in whom the vse bee: for the possession without the vse extinguisheth the whole rent as against him in the law, as wel as if the possession and vse were both ioined together in the grantee.

Do. Then me thinketh that the said Henry Hart is bound in conscience to pay the grauntee the rent after the portion of that acre that was recouered, for it cannot stand with conscience that hee should lose his rent, and haue no profits of land. S. Then of whom shall hee haue the other portion of his rent? D. Is the law cleere that the acre that the grauntor hath shall be in this case discharged in the law? S. I take the law so.

Do. And what in conscience? S. As against the grantor me thinketh also it is extinct in cōscience, for the reason that thou hast made in the 16. Chapter. For it is all one in conscience in this case as against the grauntour, whether the recouerie were to the vse of the grauntee or not, specially seeing that the grauntour is not priuie to the recouery: for the vnity of possessiō

is ỹ cause of extinguishment of the rent against the grantor both in law and conscience, whersoeuer the vse be. But if the grauntor had bin ꝑtiute to the cause of extinguishment, as hee was in the case that I put in the last Chapter, where the grauntor enfeoffed the grantee of one of the acres to the vse of the grantee, there it is not extinct in conscience in that acre that remaineth in the hands of the grantor, though it be extinct in the law, because hee was ꝑtiute to the extinguishment himselfe: but he is not so in this case, & therefore it is extinct against him in law & conscience. And therfore mee thinketh that the grauntee shall in conscience haue the whole rent of the said H. Hart, that caused the said recouerie to be had in his name, for in him was all the default: but it is to be vnderstood, that in all the cases, where it is said before in this chapter, or in the chapter next before, that the rent is extinct in the law, and not in conscience, that in such case, all the remedies that the partie might first haue had for the Rent at the common Law by distresse, assise, or otherwise, are determined, & the party that ought to haue the rent in conscience, shall bee driuen to sue for his remedie by Subpena, D. I am content with thy conceit in this matter for this time.

¶ The 18. question of the Student.

Cap. 18.

A Villeine is graunted to a man for terme of life, the villeine purchaseth Lands to him and

and to his heirs, the tenant for terme of life entreth: in this case by the Law he shall enioy the lands to him and to his heires, whether shall he do so in likewise in conscience?

D. Mee thinketh it first good to see whether it may stand with Conscience, that one man may clayme another to bee his villeine, and that he may take from him his lands and goods, and put his bodie in prison if hee will: it seemeth he loueth not his neighbour as himselfe that doth so to him.

St. That Law hath bin so long vsed in this Realme and in other also, and hath bin admitted so long in the Lawes of this Realme, and of diuers other lawes also, and hath been affirmed by Bishops, Abbots, Priours, and many other men both Spirituall and Temporall, which haue taken aduantage by the said Law, and haue seised the Lands and goods of their villeines thereby, and call it their right inheritance so to doe: that I thinke it not good now to make a doubt, ne to put it in argument whether it stand with conscience or not, and therefore I pray thee, admitting the Law in that behalfe to stand in Conscience, shew mee thine opinion in the question that I haue made.

D. Is the law cleere that hee that hath the villeine but onely for terme of life, shall haue the lands that that villeine purchaseth in fee to him and to his heires.

S. Yee verily I take it so.

D. I should haue taken the law otherwise: for

if a Seigniozie be granted to a man foz terme of life and the tenant attourne, & after the land eschеat, and the tenant foz term of life enreth, he shall haue there none other estate in the land than he had in the Seigniozie: & me thinketh that it should be like law in this case, and that the Lozd ought to haue in the Land, but such estate as he hath in the villeine. Ans. The cases bee not alike, foz in the case of the eschеate the tenant foz terme of life of the Seigniozie, hath the lands in the lieu of the Seigniozie, that is to say, in the place of the seigniozie, & the seigniozie is clerly extinct: but in this case he hath not the land in the lieu of the villaine, foz hee shall haue the villeine still as he had before, but he hath the lands as a pzofit come by means of the villaine, which he shall haue in like case as the villaine had them, that is to say, of all goods and chattels he shall haue the whole pzoperty, and of a leale foz term of peres he shal haue the whole terme, and foz terme of life he shall haue the same estate, the Lozd shall haue in the land during the life of the villaine, and of land in fee simple, and of an estate taile that the villaine hath, the Lozd shall haue the whole fee simple, although he had the villaine but only foz terme of peares, so that he enter oz seise accozding to the law before the villaine alien, oz else he shall haue nothing.

D. Verily, and if the law be so, I think consctence followeth the law therein. For admitting that a man may with consctence haue another man to be his villeine, & iudgemēt of the Law in this case (as to determine what estate

the

the Lord hath in the land by his entry) is neither against the law of reason nor against the law of God, and therefore conscience must follow the Law of the Realme. But I pray thee let me make a little digression to heare thine opinion in another case somewhat pertayning to the question, and it is this: If an Executor haue a villeine, that his testator had for terme of yeares, & he purchaseth lands in fee, and the executor entreth into the land, what estate hath he by his entry? S. A Fee simple, but that shalbe to the behoofe of the testator, & shalbe an assets in his hands. D. Well then I am content with thy concept at this time in this case, and I pray thee proceed to another question. S. For asmuch as it appeareth in this case & in some other before, that the knowledge of the law of England is right necessarie for the good ordering of the conscience: I would heare thine opinion, If a man mistake the law, what danger it is in conscience, for the mistaking of it. D. I pray thee put some case in certaine therof that thou doubtest in, & I wil with good will shew thee my mind therein, or else it will bee somewhat long or it can be plainly declared, and I would not be tedious in this writting.

¶ The 17. question of the Student.

Cap. 19.

A Man hath a Villeine for terme of life, the villein purchaseth lands in fee as in ſ case

of the last Chapter, and the tenaunt for terme of life entreth. and after the Willeine dyeth, he in the reuersion pretending that the tenaunt for terme of life hath nothing in the Land, but for terme of life of the Willeine, asketh counsaile of one that sheweth him that he hath good right to the Land, and that hee may lawfully enter, and through that counsaile hee in the reuersion entreth, by reason of the which entrie, great suits and expences follow in the Law, to the great hurt of both parties: What danger is this to him that gaue the counsaile?

D. Whether meanest thou that hee that gaue the counsaile, gaue it willingly against the Law, or that hee was ignorant of the Law?

St. That hee was ignorant of the Law: for if hee knew the Law, and gaue counsaile to the contrarie, I thinke him bound to restitutiō, both to him against whom he gaue the counsaile, and also to his Client (if hee would not haue sued but for his counsaile) of all that they be damnified by it.

D. Then will I yet further aske thee this question, whether he of whom he asketh counsaile gaue himselfe to learning, and to haue knowledge of the Law after his capacitie, or that hee toke vpon him to giue counsaile, and toke no studie competent to haue learning? for if hee did so, I thinke he bee bounden in conscience to restitution of all the costs and dammages that he sustained, to whom hee gaue counsaile, if hee would not haue sued but through his counsaile, and also to the other partie. But if a man that hath taken sufficient studie

in the law, mistake the law in some point that is hard to come to the knowledge of, hee is not bounden to such restitution, for hee hath done it in him is: but if such a man knowing the law giue counsell against the Law, is bound in conscience to restitution of costs and damages (as thou hast sayd before) and also to make amends for the vntruth

Stu. What if he aske counsell of one that he knoweth is not learned, and hee giueth him counsell in this case to enter, by force wherof hee entreth? Do. Then bee they both bound in conscience to restitution, that is to say, the partie if hee be sufficient, and else the Counsell our because hee assented and gaue counsell to the wrong.

St. But what is the Counsellor in that case bounden to him that he gaue counsell to? Do&. To nothing: For there was as much default in him that asked the counsell, as in him that gaue it, for hee asked counsell of him that hee knew was ignorant, and in the other was default for the presumption, that hee would take vpon him to giue counsell in that hee was ignorant.

St. But what if hee that gaue the counsell, knew not but that he that asked it, had trust in him, that hee could and would giue him good counsell, and that he asked counsell for to order well his conscience, howbeit that the truethy was, that he could not so doe?

D. Then is he that gaue the counsell bounden to offer to the other amends, but yet the other may not take it in conscience.

St. That were somewhat perilous, for haply he would take it though he haue no right to it, except the world be wel amended. D. What thinkest thou in that amendment? Stu. I trust euery man will do now in this world as they would be done to, speake as they think, restore where they haue done wrong, refuse money if they haue no right to it, though it bee offered them, do that they ought to doe by conscience, & though that they cannot bee compelled to it by no Law, and that none will giue counsell, but that they shall thinke to be according to conscience, and if they doe, to do what they can to reforme it, and not to intermit themselues with such matters as they be ignorant in, but in such cases to send them that alke the counsell to other, that they shall thinke bee more cunning than they are.

D. It were very well if it were as thou hast sayd, but, the more pitie, it is not alway so. And especially there is great default in giuers of counsell, for some for their owne lucre and profit giue counsell to comfort other to sue that they know haue no right, but I trust there bee but few of them: and some for dread, some for fauour, some for malice, and some vpon considerations, and to haue as much done for them an other time to hide þ truth. And some take vpon them to giue counsell in that they be ignorant in, and yet when they know the truth will not withdraw that they haue misdone, for they thinke it should be greatly to their rebuke, and such persons follow not this counsell, that saith That wee haue vnaduisedly done, let vs with

good

good aduise reuoke again. S. And if a man giue counsell in this Realme after as his learning and conscience giueth him, and regardeth not the Lawes of the Realme, giueth he good counsell? Do. If the Law of the Realme bee not in that case against the Law of God, nor against the Law of reason, hee giueth good counsell: For euerie man is bound to follow the Law of the countrie where he is, so it be not against the said lawes, and so may the case be, that he may bind himselfe to restitution. S. At this time I will no further trouble thee in this question

¶ The 18. question of the Student.

Cap. 20.

IF a man of his meere motion giue lands to H. H. and to his heires by Indenture, vpon a condition, that he shall pearely at a certaine day pay to Jo. at Stile out of the same land a certaine Rent, and if he doe not, that then it shalbe lawfull to the said Jo. at Stile to enter &c. if the rent in this case be not payed to John at Stile, whether may the said John at Stile enter into the Lands by conscience, though hee may not enter by the law? D. May he not enter in this case by the Law, sith the words of the Indenture be that he shall enter? S. Verily, For there is an ancient Maxime in the Law that no man shall take aduauntage in a condition, but he that is partie or priuie to the condition, and this man is not party nor priuie where-

wherefore he shall haue no aduauntage of it. D. Though hee can haue no aduauntage of it as partie, yet because it appeareth euidently that the intent of the giuer was, that if hee were not payed of the rent, that hee should haue the land: It seemeth that in conscience he ought to haue it, though hee cannot haue it by the Law. St. In many cases the intent of the party, is void to all intents, itif be not grounded accoz-ding to the law: And therefore if a man make a lease to another for terme of life, and after of his meere motion hee confirmeth his estate for terme of life to remaine after his death to ano-ther, and to his heires. In this case that re-mainder is void in law and conscience, for by the Law there can no remainder depend vpon no estate, but that the same estate beginneth at the same time that the remainder doth: And in this case the estate began before, and the confir-mation enlarged not his estate, nor giue him no new estate. But if a lease be made to a man for terme of another mans life, and after the lesso: onely of his meere motion confirmeth the Land to the Lessee for terme of his owne life, the remainder ouer in Fee, this is a good re-mainder in the law and conscience: and so hee thinketh the intent of the partie shall not bee regarded in this case. Do. And in the first case that thou hast put, mee thinketh though it passe not by way of graunt of that, yet shall it passe, as by the way of remainder of the reuersion, for euery deed shalbe taken most strong against the grauntor, and the taking of the deed in this case is an attornment in it selfe. St. That can-

not

not bee, for hee in the remainder is not party to the deed, and therefore it cannot be taken by the way of graunt of the reuersion: for no graunt can bee made but to him that is partie to the deed, except it be by way of remainder. And therefore if a man make a lease for terme of life, and after the lessor graunt to a stranger that the tenāt for terme of life shal haue the land to him and to his heires, that graunt is void if it bee made onely of his meere motion without recōpence. And in likewise if a man make a Lease for terme of life, and after graunt the reuersion to one for terme of life, the remainder ouer in fee, and the Tenant attorneth to him that hath the estate for terme of life only, intending that he onely should haue aduantege of the graunt, his intent is void, & both shall take aduantage therof, and the attornement shalbe taken good, according to the graunt: And so in this case, though the Feoffour intended that if the rent were not payd, that the straunger should enter, yet because the law giueth him no entrie in that case, that intent is void, & the same stranger shall neither enter into the land by law nor conscience Doct. What shall then be done with that land as thou thinkest after the condition broken? S. I thinke that the feoffor in this case may lawfully reenter, for when the feoffement was made vpō cōdition that the feoffee would pay a rent to a stranger, in those words is concluded in the Law, that if the rent were not paid to the stranger, that the feoffor should reenter: for those words vpon condition imply so much in the law though it be not expressed.

And

And then when the feoffor went further & said that if the rent were not paid, that the stranger should enter, those words were void in ꝑ law: and so the effect of the deed stood vpon the first words whereby the feoffor may reenter in law & conscience: but if the first words had not bin conditionall, I would haue holden it the greater doubt. Do. I pray thee put the case thereof in certaine with such words as be not conditionall that I may the better perceiue what thou meanest therein.

¶ The 19. question of the Student.

Cap. 21.

A Man maketh a Feoffement by deed indented, & by the same deed it is agreed, that the feoffee shal pay to I. B. & to his heirs a certaine rent yerely at certaine dayes, & that if he pay not ꝑ rent, thē it is agreed that I. B. or his heires shall enter into the land and after the feoffee payeth not the rent, thē the question is, who ought in conscience to haue this land and rent. Do. Ere wee argue what conscience will, let vs know first what the Law wil therin. St. I thinke that by the law neither the feoffor ne yet the said I. B. shall neuer enter into the Land in this case for nonpayment of the rent, for there is no reentrie in this case giuen to the Feoffor for not payment of the rent as there is in the case next before, & the entrie that is giuen to the said I. B. for not paiment thereof is void in the law, because hee is estrange to the

the deede, as it appeareth also in the next chapter before. And therefore mee thinketh that the greatest doubt in this case is to see to what vse this feoffement shall be taken.

Do. There appeareth in this case as thou hast put it, no consideration ne recompence given to the feoffor, whereupon any vse may bee derived: and if the case bee so indeed, and that the feoffour declared neuer his mind therein, to what vse shall it then be taken? St. I thinke it shall bee taken to bee to the vse of the feoffee as long as he payeth the rent, for there is no reason why the feoffee should bee busied with payment of the rent hauing nothing for his labor: ne it may not conueniently be taken that the intent of the feoffour was so except hee expressed it, & then it must bee taken that he intended to recompence the feoffee for the business, that he should haue in the paiment ouer, and by the wordes following his intent appeareth to bee so, as mee thinketh, for if the rent were not paied, he would that A. B. should enter, and so it seemeth he intended not to haue any vse himselfe: and thus me seemeth this case should varie from the common case of vses, that is to say, if a man seised of land make a feoffement thereof, and it appeareth not to what vse the feoffement was made, ne it is not vpon any bargaine or other recompence, then it shalbe taken to be to the vse of the feoffor, except the cõtrarie can be proued by some bargaine, or other like, or that his intent at the time of the liuerie of seisin was expressed that it should bee to the vse of the feoffee or of some other, and then it

shall

shall goe according to his intent: but in this case me thinketh it shalbe taken that his intēt was, that it should first be to the vse of the feoffee, for the cause before rehearsed, except the contrary can be proued, so that knowledge of the intēt of the feffor is the greatest certainty for knowledge of the vse in this case as me seemeth: but when the feoffour goeth further and said that if the rent be not paid, that then the sayd I. S. should enter into the Land, then it appeareth that his intent was that the rent should cease, and that I. S. should enter into the Land, and though hee map not by those wozds enter into the land after the rules of the law, and to haue freehold, yet those wozds seeme to bee sufficient to proue that the intent of the feoffor was that hee should haue the vse of the land: for sith hee had the rent to his owne vse, and not to the vse of the feoffour, so it seemeth he shall haue the vse of the Land that is assigned to him for the payment of the rent. Do But I am somewhat in doubt whether hee had the rent to his owne vse: for the intent of the feoffor might bee that hee should pay the rent for him to some other, or some other vse might bee appointed therof by the feoffor. St. If such an intent can bee proued, then the intent must be obserued: but wee bee in this case to wit, to what vse it shall bee taken if the intent of the feoffor cannot be proued, and then me thinketh it cannot bee otherwise taken, but it shall bee to the vse of him to whom it should be paid: for thongh it bee called a rent, yet it is no rent in Law, ne in the law he shall neuer haue remedie for it, though it were

were assigned to him, and to his heires without condition, neither by distresse, by assise, by writ of Annuitie, nor otherwise, but he shall be driuen to sue in the Chauncerie for his remedie, and then when hee sueth in the Chauncerie, hee must surmise that he ought to haue it by conscience, and that he can haue no remedie for it in the law. And then, sith he hath no remedie to come to it but by the way of Conscience, it seemeth it shall be take, that when he hath recouered it that he ought to haue it in cõscience, & that to his owne vse, without the contrarie can be proued, and if the contrarie can bee proued, and that the intent of the feoffor was, that hee should dispose it for him as hee should appoint, then hath he the rent in vse to another vse, and so one vse should bee depending vpon another vse, which is seldome seene, and shall not be intended till it be proued: and so, sith no such matter is here expressed, me thinketh the rent shall be taken to bee to the vse of him that it is payd to, and the Land in likewise that is appointed to him for not payment of the said rent shall be also to his vse, how thinkest thou, will conscience serue therein? Do. I thinke that as thou takest the Law now, that conscience (in this case) and the Law bee all one, for the law searcheth the same thing in this case, to know the case that conscience doth, that is to say, the intent of the feoffor, and therefore I would moone thee further in one thing. Stu. What is that?

D. That sith ꝑ intẽt of ꝯ feffor shalbe so much regarded in this case, why it ought not also

ꝯ

to be as much regarded in the case that is in ꝑ last chapter next before this, where the wordes be conditionall, & giue the feoffor a title to reenter: for me thinketh, that though the feoffor may in that case reenter for the condition broken, that yet after this entry he shall be seised of the land after his entry to the vse of him, to whom the Land was assigned by the said Indenture for lacke of payment of the rent, because the intent of the feoffor shall be taken to be so in that case alwell as in this. And I pray thee let mee know thy mind, what diuersitie thou puttest betweene them. S. Thou driuest mee now to a narrow diuersitie, but yet I will answere thee therein as well as I can. D. But first ere thou shew me that diuersitie, I pray thee shew mee how Vses began, and why so much Land hath beene put in vse in this Realme as hath bin. S. I will with good will say as mee thinketh therein.

¶ How vses of land first began, and by what law; and the cause why so much land is put in vse.

Cap. 22.

VSes were reserued by a secõdary cõclusiõ of ꝑ law of reason in this maner: whẽ the generall custom of property, whereby euery man knew his owne good frõ his neighbors was brought in among ꝑ people: It followed of reason ꝑ such lands & goods as a man had, ought not to be taken from him but by his assent

assent or by order of a law: and then sith it is so that euerie man that hath Lands hath thereby 2 things in him, that is to say, the possession of the Land which after the Law of England is called the franktenement or the freehold, & the other is authoritie to take thereby the profits of the land: wherefore it followeth that he that hath land & intendeth to giue onely the possession & freehold thereof to another, & to keepe the profits to himselfe, ought in reason & conscience to haue the profits, seeing there is no law made to prohibite, but that in conscience such reservation may be made. And so when a man maketh a feoffement to another and intendeth that he himselfe shal take the profits, then the feoffee is said seised to his vse that so inuested him, that is to say, to the vse that he shall haue the possession & freehold thereof, as in the law, to the intent that the feoffor shal take the profits: and vnder this maner, as I suppose, vses of land first began. D. It seemeth that the reseruing of such vse is prohibited by the law, but if a man make a feffement and reserue the profits, or any part of the profit, as the grasse, wood or such other, that reservation is void in the law: & me thinketh it is all one to say, that the Law iudgeth such a thing if it bee done to bee void, & that the law prohibiteth that the thing shal not be done. St. Truth it is that such reservation is void in the law as thou saist, and that is by reason of a Maxime in the Law that willeth þ such reservation of part of the same thing shall be iudged void in the law: but yet the law doth not prohibite that no such reservation shall bee made

but if it be made it iudgeth of what effect it shal be that is to say, that it shall be void, and so hee that maketh such reseruation offendeth no law thereby, ne breaketh no law thereby, and therefore the reseruation in conscience is good: but if it were prohibite by statute that no man should make such reseruation, ne ꝑ no feffemēt of trust should be made, but ꝑ all the feffements should bee to the vse of him to whom possession of the land is giuen: then the reseruation of such vses against the Statute should be void, because it were against the law, & yet such a statut should not be a statute against reason, because such vses were first grounded & reserued by the law of reason, but it should prevent the law of reason, & should put away the cõsideration wherevpon the Law of reason was grounded before the statute made. And then to the other questiõ, that is to say, why so much land hath bene put in vse, it will be somewhat long & paraventure to some tedious to shew all the causes particularly: but the verie cause why the vse remained to the feoffor notwithstãding his own feffemēt or fine, & sometime notwithstanding a recouery against him, is all vpõ one consideration after the cause and entent of the gift, fine, or recouery, as is aforesaid D. Though reason may serue that vpon a feffement a vse may be reserued to the feoffor by the intent of the feoffor against the forme of his gift, as thou hast said before, yet I marueil much how an vse may be reserued against a fine, that is one of ꝑ highest Records that is in the law, and is taken in the Law of so high effect that it should make an

end

end of all strifes, or against a recouery that is ordained in the law for them that be wronged to recouer their right by: and me thinketh that great inconuenience & hurt may follow, when such Records may so lightly bee auoided by a secret intent or vse of the parties, & by a naked and bare auerrement & matter indeed, and specially sith such a matter indeed may be alledged that is not true, whereby may rise great strife betweene the parties, & great confusion & vncertainty in the law: but neuertheless sith our intent is not at this time to treat of that matter, I pray thee touch shortly some of the causes, why there hath bin so many persons put in estate of lands to the vse of other, as there hath bin. For as I heare say, few men be sole seised of their owne land. Where hath beene many causes thereof, of the which some be put away by diuers Statuts, & some remain yet. Wherfore thou shalt vnderstand, that some haue put their land in feoffement secretly, to the intent that they that haue right to the Land, should not know against whom to bring their action, and that is somewhat remedied by diuers Statutes that giue actions against Parnors and takers of the profits. And sometime such feoffements of trust haue bin made to haue maintenance & bearing of their feoffes, which peraduenture were great Lords or rulers in the Countrie: and therefore to put away such maintenance, treble damages be giuen by statute against them that make such feoffements for maintenance. And sometime they were made to the vse of Mortmaine, which might then be made with-

out forfeiture though it were prohibited ℔ the freehold might not be giuen in Mortmain. But that is put away by the Statute of R. 2. And sometime they were made to defraud the lords of wards, reliefes, herriots, and of the lands of their villeines: but those points bee put away by diuers Statutes made in the time of king H. the 7. Sometime they were made to auoid executions vpon Statute Staple, Statute Merchant, & Recognisance: & remedie is prouided for that, that a man shall haue execution of all such lands as any person is seised of to the vse of him that is so bound, at the time of execution sued in the 19. yeare of H. 7. And yet remain feoffements, fines, and recoueries in vse of many other causes, in manner as many as there did before the said statute. And one cause why they be yet thus vsed, is to put away tenancie by the curtesie, and title of Dower. Another cause is, for that lands in vse shall not be put in execution vpon a Statute Staple, Statute Merchant, nor Recognisance, but such as be in the hands of the Recognisor at the time of the execution sued. And sometime lands be put in vse that they should not be put in execution vpon a writ of Extendi facias ad valentiam. And sometime such vses bee made, that hee to whose vse ec. may declare his will thereon, & sometime for surette of diuers couenants in Indentures of marriage, & other bargaines, & these 2. last articles, be the chief & principal cause why so much land is put in vse. Also lands in vse be not assets neither in a Formedō nor in an action of Debt against the heire: ne they shal not be put in execution

cution by an Elegit sued vpon a recouerie as some men say: & these be the verie chiefe causes as I now remember, why so much Land standeth in vse as there doth: & all the said vses be reserued by the intēt of the parties vnderstood or agreed betweene them, and that many times directly against the words of ỹ feoffement, fine, or recouery, and that is done by the law of reason, as is aforesaid. D. May not a vse be assigned to a stranger, aswell as to be reserued to the Feoffor, if the Feffor so appointed it vpon his feoffement? Stu. Yes aswell, and in likewise to the feoffee, & that vpon a free gift without any bargain or recompence, if the feoffor so will. D. What if no feoffement be made but that a man grant to his feffee, that from henceforth he shall stand seised to his owne vse, is not that vse changed, though there be no recompence? Stu. I thinke yes, for there was an vse in Esse before the gift, which he may as lawfully giue away, as he might ỹ land if he had it in possession. D. And what if a man being seised of land in fee, grāt to another of his meere motiō without bargaine or recompence, ỹ he from thencefoorth shall be seised to the vse of the other, is not that graunt good? St. I suppose that it is not good, for as I take the Law, a man cannot commence an vse but by liuery of seisin or vpon a bargaine or some other recompence. D. I hold me contented with that thou hast said in this Chapter for this time, & I pray thee shew me what diuersitie thou puttest betweene those two cases that thou hast before rehearsed in the 20. Chapter and in the 21. Chapter of this

preſent booke. &c. I will with gods will.

§ The diuerſitie betweene two caſes hereafter following, whereof one is put in the 20. Chapter, and the other in the 21. Chapter of this preſent Booke.

Cap. 23.

THe firſt caſe of the ſaid two caſes is this. A mã maketh a feffemẽt by deed indẽted vpõ a condition ỹ the feoffee ſhall pay certain rent yearely to a ſtranger, &c. & if he pay it not, that it ſhalbe lawfull to the ſtranger to enter into the land. In this caſe I ſaid before in the 20. Chapter, that the ſtraunger might not enter, becauſe that he was not priuy vnto the condition. But I ſaid, that in that caſe the feoffor might lawfully reenter by the firſt wordes of the Indenture, becauſe they imply a condition in the law, and that the other wordes (ỹ is to ſay) that the ſtraunger ſhould enter, bee void in law & conſcience. And therefore I ſaid farther, that when the feoffor had reentred, that he was ſeiſed of the land to his owne vſe, and not to the vſe of the ſtranger, though his intent at the making of the feoffement, were that the ſtranger after his entrie, ſhould haue had the land to his owne vſe, if he might haue entred by the law. And the cauſe why I thinke that the feoffor was ſeiſed in that caſe to his owne vſe, I ſhall ſhew thee afterward. The ſecond caſe is this, a man maketh a feoffement in fee, and it

is agreed vpon the feoffement, that the feoffee shall pay a yerely rent to a stranger, & if he pay it not, that then the straunger shall enter into the land. In this case I said as it appeareth in the said xxj. Chapter, that if the Feoffee pated not the rent: that the stranger should haue the vse of the land, though he may not by the rules of the law enter into the land, and the diuersitie betweene the cases me thinketh to bee this. In the first case it appeareth as I haue said before in the said xx. Chapter, that the feoffour might lawfully reenter by the law for not payment of rent, & then when he entred according, he by that entrie auoided the first liuery of seisin, insomuch that after the reentrie hee was seised of the Land of like estate as hee was before the feoffement: And so remayneth nothing, whereupon the stranger might ground his vse, but onely the bare graunt or intent of the feoffor: when he gaue the land to the feffee vpon condition that hee should pay the rent to the straunger, and if not, that it should be lawfull to the stranger to enter: for the feoffement is auoyded by the reentry of the feffor as I haue said before: and as I sayd in the last Chapter, as I suppose a nude or bare graunt of him that is seised of land, is not sufficient to begin an vse vpō. D. A bare grant may change an vse as thou thy selfe agreed in the last chapter, why then may not an vse aswell begin vpon a bare grant? S. When an vse is in Esse, he that hath the vse may of his meere motion giue it away if hee will without recompence, as he might the land if hee had it in possession,

but I take it for a ground, that he can not so begin an vse without liuery of seisin, or vpon a recompence or bargaine, & that there is such a ground in the law, þ it may not so begin it appeareth thus: It hath bin alway holde for law, that if a man make a deed of feoffement to another & deliuer the deed to him as his deed, that in this case he to whom the deed is deliuered, hath no title ne medling with the land afore liuerie of seisin be made to him, but onely that he may enter & occupie the land at the will of the feoffor, & there is no booke saith that the feoffee in that case is seised therof before liuery to the vse of the feoffee. And in likewise if a man make a deed of feffement of 2. acres of land that lie in 2. shires, intending to giue them to the feoffee & maketh liuerie of seisin in the one shire, & not in the other, in this case it is commonly holden in bookes that þ deed is void to the acre where no liuery is made, except it lie within that vse saue only that he may enter & occupy at will, as is afore said: & there is no booke that saith that the feffee should haue the vse of the other acre, for if an vse passed thereby, then were not the deed void in all intents, & yet it appeareth by the words of the deed that the feffor gaue the lands to the feffee, but for lacke of liuery of seisin the gift was void. & so me thinketh it is here without liuery of seisin be made accordingly: but in the 2. case of the said 2. cases the feoffee may not reenter for non-payment of the rent, and so the first liuery of seisin continueth & standeth in effect, and thereupon the first vse may well begin and take effect in the stranger of the land

when

when the rent is not paid vnto him according to the first agreement. And to me thinketh that in the first case the vse is determined, because the liuery of seisin. Wherupon it commenced is determined, & that in the second case the vse of the land taketh effect in the Graunger for not paiment of the rent, by the grāt made at the first liuery, which yet continueth in his effect, & this me thinketh is the diuersitie betweene the cases. Do. Yet notwithstanding the reason that thou hast made, me thinketh that if a man seised of Lands, make a gift thereof by a nude promise without any liuery of seisin or recōpence to him made, and grant that hee shall bee seised to his vse, that though the promise be voide in the law, that yet neuertheles it must hold and stand good in conscience and by the law of reason, for one rule of the law of reason is, that we may do nothing against the truth, and sith the trueth is that the owner of the ground hath graunted that he shalbe seised to the vse of the other, that grant must needs stand in effect, or else there no trueth in the grauntor. S. It is not against the truth of the graunto z in this case, though by the graunt hee be not seised to the vse of the other, but it proueth that he hath graunted that the Law will not warrant him to graunt, wherefore his graunt is void. But if the grauntor had gone further and said, that hee would also suffer the other to take the profits of the lands without let or other interruption, or that hee would make him estate in the land when hee should bee required, then I think in those cases he were bound in cōscience,

by

by that rule of the law of reason that thou hast remembred, to performe them, if he intend to be bounden by his promise, or els he should goe against his owne truth, and against his owne promise. But yet it shall make no ple in that case, nor he to whom the promise is made shall haue no action in the Law vpon that promise, though it bee not performed, for it is called in the Law a Nude or naked promise. And thus me thinketh, that in the first case of the sayde two cases, the grant is now auoided in the law by the reentry of the feoffor, and that the feffor is not bounden by his grant neither in law nor conscience, but in the second case hee is bound, so that the ple palleth frō him, as I haue sayd before. D. I hold me content with thy conceit for this time, but I pray thee shew mee somewhat more at large what is taken for a Nude contract, or naked promise in the Lawes of England, and where an action may lye thereupon, and where not. St. I will with good will say as me thinketh therein.

¶ What is a Nude contract, or naked promise after the Lawes of England, and whether any action may lye thereupon.

Cap. 24.

FIrst it is to be vnderstood, that contracts be grounded vpon a custome of the realm, & by the law that is called Ius gentium, & not directly by the law of reason, for when all things were in common, it needed not to haue contracts

tract, but after property was brought in, they were right expedient to all people, so that a man might haue of his neighbor that hee had not of his owne, and that could not be lawfully but by his gift, by way of lending, concord, or by some leale, bargain, or sale: and such bargains and sales bee called contracts, and bee made by assent of the parties vpon agreement betweene them, of goods or lands, for money, or for other recompence, but of mony viuall, for mony viual is no contract. Also a concord is properly vpon an agreement betweene the parties, with diuers articles therin, some rising on the one part, and some on the other, As if I. at Stile letteth a Chamber to Henrie Hart, and it is farther agreed betweene them, that the said H. Hart shall goe to bord with the said John at Stile, and the said Henry Hart to pay for the Chamber and bording a certaine summe &c. this is properly called a Concord, but it is also a contract, & a good action lieth vpon it. Howbeit it is not much argued in the Lawes of England what diuersitie is betweene a contract, a concord, a promise, a gift, a lone, or a pledge, a bargain, a couenant, or such other. For the intent of the law is to haue the effect of the matter argued and not the termes. And a nude contract is, where a man maketh a bargaine, or a sale of his goods or landes, without any recompence appointed for it: As if I say to another, I sell thee all my Land, or all my goods, and nothing is assigned that the other shall giue or pay for it, this is a Nude contract, and as I take it, it is void in the law and conscience: and a Nude

or

or naked promise is, where a mā promiseth another to giue him certaine mony such a day, or to build an house, or to do him such certaine seruice, & nothing is assigned for the mony, for the building, nor for the seruice: these be called naked promises, because there is nothing assigned why they should be made, and I thinke no action lyeth in those cases though they bee not performed. Also if I promise to another to kepe him such certaine goods safely to such a time, & after I refuse to take them, there lyeth no action against me for it: But if I take thē and after they be lost or impayred through my negligent képing, there an action lieth D. But what opinion hold they that bee learned in the law of Englād in such promises that be called naked or nude promises: whether do they hold that they that make the promise, be bounden in conscience to perform their promise, though they cannot be compelled thereto by the law, or not? S. The bookes of the Law of England entreat little thereof, for it is left to the determination of Doctors, and therefore I pray thee shew me somwhat now of thy mind therin, & then I shal shew thee therin somewhat of the minds of diuers, that be learned in the law of the realme. Do. To declare ẏ matter plainely after the saying of Doctors, it would aske a long time, and therefore I will touch it briefly, to giue thee occasion to desire to heare more therein hereafter. First thou shalt understād that there is a promise that is called an Vowow, & that is a promise made to God, & hee that doth make such a vow vpon a deliberate mind intending to performe

forme it, is bound in conscience to do it, though it be only made in the heart without pronouncing of words, and of other promises made to men upon a certain consideration, if the promise be not against the law: as if I promise to give Peter because he hath made him such a house, or hath lent him such a thing, or such other like, I thinke him bound to keep his promise. But if his promise be so naked, that there is no manner of consideration why it should be made, then I thinke him not bound to performe it, for it is to suppose that there was some errour in the making of the promise: but if such a promise be made to an Vniuersitie, to a city, to the church, to the Clergie, or to poore men of such a place, or to the honour of God, or such other cause like, as for maintenance of learning, of the common wealth, of the seruice of God, or in relefe of pouertie, or such other, then I think that hee is bounde in conscience to performe it, though there bee no consideration of worldly profit, that the graunter hath had or intendeth to haue for it: and in all such promises it must bee vnderstood that hee that made the promise intended to bee bound by his promise, for else commonly after all Doctors he is not bound, vnlesse hee were bound to it before his promise: as if a man promise to giue his father a gowne that hath need of it, to keep him from cold, and yet thinketh not to giue it him, nevertheless he is bound to giue it, for hee was bound thereto before. And after some Doctours a man may be excused of such a promise in conscience by casualtie that commeth after the promise, if it be so, that if hee

hath

had knowne of the casualtie at the making of the promise hee would not haue made it. And also such promises if they shall bind, they must be honest, lawfull, and possible, and els they are not to be holden in conscience, though there be a cause &c. And if the promise be good and with a cause, though no worldly profit shall grow thereby to him that maketh the promise, but onely a spirituall profit, as in the case before rehearsed of a promise made to an Vniuersity, to a Citie, to the Church, or such other, with a cause as to the honour of God, there is most commonly holden that an action vpon those promises lyeth in the Law Cannon. Sc. Whether doest thou meane in such promises made to an Vniuersitie, to a city, or to such other as thou hast rehearsed before, with a cause, as to the honour of God or such other, that the partie shalbe bound by his promise, if he intended not to be bound thereby, ye or nay? Do. I thinke nay, or more than vpon promises made vnto common persons. Sc. And then mee thinketh clerely, that no action can lie against him vpon such promises, for it is secret in his owne conscience, whether he intended for to be bound or nay. And if the intent inward in ỹ heart, mans law cannot iudge, and that is one of the causes why the Law of God is necessary (that is to say) to iudge inward things, and if an action should lye in ỹ case in ỹ law canon, then should the law Cannon iudge vpō ỹ inward intent of the heart, which cannot be as me seemeth. And therefore after diuers ỹ be learned in the lawes of the realme, all promises shalbe taken in this

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manner, that is to say, If he to whom the promise is made, haue a charge by reason of the promise which he hath also performed: then in that case hee shall haue no action for that thing that was promised, though hee that made the promise haue no worldly profit by it. And if a man say to another, heale such a poore man of his disease, or make an high way, and I shall giue thee thus much, and if he doe it, I thinke an action lyeth at the common law. And moreouer though the thing that he shall doe bee all spirituall, yet if hee performe it, I thinke an action lyeth at the common Law. As if a man say to another, fast for me all the next Lent, and I shall giue thee twenty pounds, and he performeth it, I thinke an action lyeth at the common Law. And in likewise if a man say to another, marry my daughter and I will giue thee twenty pounds, vpon this promise an action lyeth, if hee marry his daugheer: And in this case hee cannot discharge the promise though hee thought not to be bound thereby, for it is a good contract, and he may haue Quid pro quo, that is to say the preferment of his daughter for his money. But in those promises made to an Vniuersitie, or such other as thou hast remembred before, with such causes as thou hast shewed, that is to say, to the honour of God, or to the increase of learning, or such other like, where the partie to whom the promise was made is bound to no new charge, by reason of the promise made to him, but as he was bound to before, there they thinke that no Action lyeth against him, though hee performe not his

his promise, for it is no contract, & so his owne conscience must be his iudge whether he intended to bee bound by his promise or not. And if he intended it not, then hee offended for his dissimulation only, but if he intended to be bound, then if he performe it not, vntruth is in him, and he prouoketh himselfe to bee a lyer, which is prohibited aswel by the law of God, as by the law of reason: And furthermore, many ỹ be learned in the Law of England hold, that a man is as much bounde in conscience by a promise made to a common person, if he intended to be bound by his promise, as hee is in the other cases that thou hast remembred of a promise made to the Church, or the Clergie, or such other: for they say that almuch vntruth is in the breaking of the one as of the other, and they say that the vntruth is more to bee punished than the person to whom ỹ promises be made D. But what hold they if the promise be made for a thing past as I promise thee xl. l. for that thou hast builded me such a house, lyeth an action there? S. They suppose nay, but he shall be bound in conscience to performe it after his intent, as is before said. Do. And if a man promise to giue another xl li. in recompence for such a trespasse that he hath done him, lyeth an action there? S. I suppose nay, & the cause is for that such promises be no perfect contracts: for a contract is properly where a man for his money shall have by assent of the other party certaine goods or some other profit at the time of ỹ contract or after: but if ỹ thing bee promised for a cause ỹs past by way of a recõpence, then it is rather an accord thã a con-

contract, but then the Law is, that vpon such accord the thing that is promised in recopence must be paid, or deliuered in hand, for vpon an accord there ipeth no action. D. But in the case of trelpasse, whether hold they that he be bound by his promise, though hee intended not to bee bound thereby. S. They thinke nay, no more thã in the other cases that be put before. Do. In the other cases he was not bound to that he promised, but onely by his promise, but in this case of trelpas, hee was bound in conscience before the promise to make recompence for the trelpasse: and therefore it seemeth, that he is bound in conscience to keepe his promise, though hee entended not to be bound thereby.

S. Though hee were bound before the promise to make recompence for his trelpas, yet he was not bound to no summe in certaine but by his promise: and because that the summe may bee too much, or too little, and not egall to the trelpasse, and that the partie to whom the trelpas was done notwithstanding the promise is at liberte to take his action of trelpasse if hee will, therefore they hold that hee may bee his owne Iudge in conscience, whether he intended to bee bound by his promise or not, as hee may in other cases, but if it were of a debt, then they hold that he is bound to performe his promise in conscience. Doct. What if in the case of Trelpasse hee affirmeth his promise with an oath. S. Then they hold that hee is bound to performe it for saueing of his oath, though hee entended not to bee bound, but if hee entended to be bound by his promise, then they say, that

an oath néedeth not but to enforce the promise, for they say, hee breaketh the Law of reason, which is, that we may doe nothing against the truth, aswell whē he breaketh his promise that he thought in his owne heart to be bound by, as he doth when he breaketh his oath, though the offence bee not so great by reason of the periurie. Moreouer to that thou sayest that vpon such promises as thou hast rehearsed before, shall lye an action after the law Cannon, verily as to that in this realme there can no action lye thereon in the spirituall court, if the promise bee of a temporall thing, for a prohibition, or a Præmunire facias should lye in that case. D. That is marueil sith there can no action lye thereon in the Kings court as thou saist thy selfe. S. That maketh no matter, for though there lie no action in the Kings court, against executors vpon a simple contract, yet if they bee sued in that case for the debt in the Spirituall court, a prohibition lyeth. And in likewise if a man wage his Law vntruely in an action of debt vpon a contract in the Kings Court, yet hee shall not be sued for the periurie in the spirituall court, and yet no remedie lyeth for the periurie in the Kings Court: for the prohibiton lyeth not onely, where a man is sued in the Spirituall Court of such things, as the party may haue his remedie in the Kings court, but also where the Spirituall Court holdeth plee in such case, where they by the Kings prerogatiue, and by the auncient customs of the realme ought none to hold. Doct. I will take aduisement vpon that thou hast said in this matter, till another time,

time, and I pray thee now proceede to another question.

¶ The 20. question of the Student.

Cap. 25.

A Man hath two sons, one borne before espousels, & the other after espousels, & the father by his will bequeatheth to his son & heire all his goods, which of these two sonnes shal haue the goods in conscience? D As I said in our first dialogue in latin, the last Chap. the doubt of this case dependeth not in the knowing what conscence will in this case, but rather the knowing which of the sonnes shall bee iudged heire (that is to say) whether he shall be taken for heire that is heire by the Spirituall Law, hee that is heyre by the Law of the Realme, or else that it shall bee iudged for him that the father tooke for heire? St. As to that point, admit the Fathers mind not to be knowen, or els that his mind was that he should be taken for heire, that should be iudged for heir by the law, that in this case it ought to bee iudged by. And then I pray thee shew mee thy minde therein, for though the question be not directly depending vpon the point to see what conscience will in this case, yet it is right expedient for the well ordering of conscience, that it bee knowne after what law it shall bee iudged: for if it ought to be iudged after the tempozall law who would be heire, thē it were against conscience, if the iudges in the spirituall Law should

Judge him for heire that is heire by the spirituall Law, and I thinke they should bee bound to restitution thereby, and therefore I pray thee shew mee thine opinion, after what Law it shall be iudged D. Mee thinketh that in this case it shall be iudged after the law of ꝯ church, for it appeareth that the bequest is of goods, and therefore if any suit shalbe taken vpon the execution of the will for the bequest, it must bee taken in the Spirituall Court, and when it is depending in the Spirituall court, me thinketh it must be iudged after the spirituall law: for of the Temporall law they haue no knowledge, nor they are not bound to know it as mee thinketh, and more stronger not to Iudge after it. But if the bequest had beene of a chattell reall, as of a lease for terme of yeares, or of a ward, or such other, then the matter should haue come in debate in the Kings Court, and then I thinke the Iudges there should iudge after the Law of the Realme, and that is, that the ponger brother is heire: and so me thinketh the diuersitie of the Courts shall make the diuersitie of iudgement. St. Of that might follow a great incõuenīce as me seemeth, for it might be such a case that both chattels reall, and chattels personall were in the will, & thē after thine opinion, the one sonne should haue the chattels personall, and the other sonne the chattels reall, and it cannot be conuenently taken as mee thinketh, but that the fathers will was, that the one sonne should haue all, and not bee diuided. Therefore me thinketh that he shalbe iudged for heire that is heire by the common law:

and

and that the Iudges spirituall in this case bee bound to take notice what the common law is, for sith the things that be in variance bee temporall, that is to say, the goods of the father, it is reason that the right of them in this realme shall bee determined by the law of the Realme.

D. How may that be? for the Iudges spirituall know not the law of the Realme, ne they cannot know it as to the most part of it, for much part of the law is in such speech that few men haue knowledge of it, & there is no meanes ne familiarite of studie betweēn them that learne the said Lawes: for they be learned in seuerall places and after diuers wayes, & after diuers maners of teachings, and in diuers speeches, & commonly the one of them haue none of the Bookes of the other, and to bind the spirituall Iudges to giue Iudgement after the law that they know not, ne that they cannot come to the knowledge of it, seemeth not reasonable.

Stu. They must doe therein as the Kings Iudges must doe, when any matter commeth before thē that ought to bee iudged after the spirituall Law, whereof I put diuers cases in our first Dialogue in English the vij. Chapter, that is to say, they must either take knowledge of it by their own study or els they must enquire of thē that be learned in the law of the Church, what the law is, and in likewise must they doe. But it is to doubt, that some of them would be loath to aske any such question in such case, or to confesse that they are bound to giue their iudgement after the temporall Law, and surely they may lightly offend their conscience.

D. I suppose that some be of opinion that they are not bound to know the law of the realme, & verily to my remembrance I haue not heard that Iudges of the spirituall law are bound to know the law of the realme.

St. And I suppose that they are not onely bound to know the Law of the Realme, or to do that in them is to know it, when the knowledge of it openeth the right of the matter that dependeth before them, but that they bee also bound to know where and in what case they ought to Iudge after it, for in such cases they must take the Kings Law as the Law spirituall to that point, & are bound in conscience to follow it as it may appeare by diuers cases, whereof one is this. Two Iointenants be of goods, and the one of them by his last will bequeatheth all his part to a straunger and maketh the other Iointenant his Executor & dyeth, if he to whom the bequest is made, sue the other iointenant, vpon the legacie as executor &c vpon this matter shewed, the Iudges of the Spirituall Law are bound to iudge the will to be void, because it is voide by the Law of the realme, whereby the iointenant hath right to the whole goods by the title of the Suruyuour, and is iudged to haue the goods as by the first gift which is before the title of the Will, and must therefore haue preferment as the eldest title, & if the Iudges of the Spirituall Court iudge otherwise, they are bound to restitution: and by like reason the Executours of a man that is Outlawed at the time of his death may discharge themselues in the

Spirit-

Spirituall court of the performing of legacies, because they be chargeable to the King, and yet there is no such law of Mitigatie in the Spirituall Law.

D. By occasion of that thou hast said before I would aske of thee this question. If a Parson of a Church alien a portion of Dismes according as the Spirituall law hath ordayned, is not that alienation sufficient, though it haue not the solemnities of the Temporall Law? &c. I am in doubt therein if the portion be under the fourth part of the value of the Church: but if it be to the value of the fourth part of the Church, or aboue, it is not sufficient, and therefore was the writ of right of dismes ordained: and if in a writ of right of Dismes it bee iudged in the kings Court for the patron of the successor of him that alieneth, because the alienation was not made according to the common law, then the Iudges of the spirituall law are bound to giue their iudgement according to the iudgement giuen in the Kings Court. And in likewise if a parson of a Church agree to take a pension for the tithe of a Mill, if the pension be to the fourth part of the value of the Church or aboue, then it must be aliened after the solemnities of the Kings Lawes, as lands and tenements must, or else the patron of the successor of him that alieneth, may bring a writ of right of Dismes, and recouer in the Kings courts: & then the Iudges of the spirituall court are bound to giue iudgement in the Spirituall Courts accordingly, as is aforesaid, Doct. I haue heard say, that a writ of right of dismes is

giuen by the Statute of West. 2. and that speaketh onely of dismes, & not of pensiõs. 5. Where a Parson of a Church is wrongfully deiected of his dismes, and is let by an Indicauit to aske his Dismes in the Spirituall Court, then the patron may haue a Writ of Right of Dismes by the statute that thou speakest of, for there lay none at the Common Law, for the Parson had there good right, t hough hee were let by the Indicauit to sue for his right. But when that Parson had no remedie at the Spirituall law, there a Writ of Right of Dismes lay for the Patron by the common law, as well of pensions as of Dismes, and some say that in such case it lay of lesse than of the fourth part by the common Law, but that I passe ouer. And the reason why it lay at the common Law, if the Dismes or pensions were aboue the fourth part &c. was this: by the spirituall law the alienation of the parson with ꝑ assent of the Bishop and of the Chapter shall barre the successour without assent of the patron and so the patron might lese his patronage and he not assenting thereto: for his encumbent might haue no remedy but in the Spirituall court, and there hee was barred, wherefore the patron in that case shall haue his remedy by ꝑ common law where the assent of the Ordinary and Chapter without the Patron shall not serue, as it is sayd before. But where the encumbent had good right by the Spirituall Law, there lay no remedie for the Patron by the Common Law, though the encumbent were let by an Indicauit, and for that cause was the said Statute made, and it

lieth

lieth aswell by the equity for offrings and pensions, as for Dismes. Then further I would thinke that where the Spirituall Court may hold plee of a temporall thing, that they must iudge after the temporall Law, and that ignorance shall not excuse them in that case: for by taking of their office they haue bound themselues to haue knowledge of asmuch as belongeth to their office, as all Iudges be, spirituall, or temporall. But if it were in argument in this case, whether the eldest sonne might bee a Priest because he is a bastard in the temporall Law, that should be iudged after the spirituall Law, for the matter is spirituall. Do yet notwithstanding all the reasons that thou hast made, I cannot see how the Iudges of the spirituall Law, shall be compelled to take notice of the temporal Law, seeing that the most part of it is in the French Tongue for it were hard that euery Spirituall Iudge should bee compelled to learne the tongue. But if the Law of the Realme were set in such order that they that intend to studie the Law Cannon, might first haue a sight of the law of the Realme, as they haue now of the Law Ciuill, and that some Bookes and treatises were made of cases of conscience concerning these two Lawes, as there be now concerning the Law Ciuill & the law Cannon, I would assent that it were right expedient, and then reason might serue the better, that they should be compelled to take notice of the Law of the Realme, as they bee now bound in such Countries as the law Ciuill is vsed to take notice of that Law.

Stu.

St. Mée thinketh thine opinion is right good and reasonable, but till such an order be taken, they are bound, as I suppose, to inquire of the that be learned in the common Law, what the Law is, and so to giue their iudgement accordiug, if they will kéep themselues from offence of conscience. And forasmuch as thou hast well satisfied my mind in all these questions before, I pray thee now that I may somewhat féele thy mind in diuers articles that be written in diuers bokes for the ordering of conscience vpon the Law Cannon and Ciuill: for mée thinketh, that there be diuers conclusions put in diuers bokes, as in the Summes called summa Angelica, and summa Rosella, & diuers other, for the good order of conscience, that bee against the law of this realme, and rather blind conscience, then do giue any light vnto it.

D. I pray thée shew me some of those cases: Stu. I will with good will.

¶ Whether an Abbot may with conscièce present to an Aduowson of a Church that belongeth to the house without assent of the Couent.

Cap. 26.

IT appeareth in the Chapter, Et agnoscitur de his quæ sunt a Prælatis, the which Chapter is recited in the sum called summa Angelica, in the title Abbas, the xxbij. article, that he may not without any custome, or any special priuile

priuiledge to helpe therein. Dr. Truth it is, that there is such a decretall, but they that be learned in the law of England, hold the decretall bindeth not in this Realme, & this is the cause why they doe hold that opinion: By the Law of the realme the whole disposition of lands & goods of the Abbey is the Abbots onely for the time that he is Abbot, and not in the Conuent: for they bee but as dead persons in the Law, and therefore the Abbot shall sue and be sued onely without the Conuent, doe homage, fealtie, attorne, make leases, and present to auowsons onely in his owne name, and they say further, that this authority cannot bee taken from him, but by the Law of the Realme, and so they say, that the makers of the decretall exceeded their power: wherefore they say it is not to be holden in conscience, no more thā if a decree were made that a lease for terme of yeares or at will made by the Abbot without the conuent should be immediatly void, & so they thinke that the Abbot may in this case present in his owne name without offence of conscience, because the saide decretall holdeth not in this Realme Do. But many be of opinion, that no man hath authoritie to present in right and conscience to any benefice with Cure but the Pope, or that hee hath his authoritie therein derined from the Pope: for they say that forasmuch as the Pope is the Vicar generall vnder God, & hath the charge of the soules of all people that be in the flocke of Christs Church, it is reason that sith hee cannot minister to all, he doe that is necessarie to all people for their

soules

soules health in his owne person, that he shall assigne deputies for his discharge in that behalfe. And because Patrons claime to present to Churches in this Realme by their owne right, without Title derived from the Pope, they say that they usurpe upon the Popes authoritie: & therefore they conclude that though the Abbot haue title by the law of the Realme to present in this case in his owne name, that yet because that title is against the Popes prerogatiue that that title, ne yet the Law of the Realme that maintaineth that title, holdeth not in conscience. And they say also that it belongeth to the law Cannon to determine the right of presentment to benefices, for it is a thing spirituall and belongeth to the spirituall iurisdiction, as the deprination from a benefice doth, and so they say the said decretall bindeth in conscience, though in the law of the Realme it bindeth not. St. As to the first consideration I would right well agree, that if the patrons of Churches in this Realme claimed to put incumbents into such Churches as should fall voyd of their Patronage without presenting them to the Bishop, or if they claimed that the Bishop should admit such incumbent as they should present without any examination to bee made of his abilitie in that behalfe, that that claime were against reason and conscience, for the cause that thou hast rehearsed: But forasmuch as the Patrons in this Realme claime no more but to present their Incumbents to the Bishop, and then the Bishop to examine the abilitie of the incumbent, and if he find him

by

by the Examination not able to haue cure of soules, he then to refuse him, and the patron to present another that shalbe able, and if he be able, then the Bishop to admit him, institute him, & induct him, I think that this calme, and their presentments thereupon stand with good reason and conscience. And as to the second consideration, it is holden in the Lawes of the Realme, that the right of presentment to a Church, is a temporall inheritance, & shall discend by course of inheritance from heire to heir as lands & tenements shall, & shalbe take as an assets as lands and tenements be: and for the triall of the right of patronages be ordeined in the law diuers actions for them y be wronged in that behalfe, as writs of right of Auowson, Assises of Darrein presentment, Quare impedit, & diuers other which alway without time of mind haue bin pleaded in the Kings courts, as things pertaining to his Crowne and royall dignitie: and therefore they say that in this case his lawes ought to bee obeyed in law and conscience. D. If it come in variance whether hee that is so presented bee able or not able, by whom shall the abilitie be tried? St. If the ordinary bee not partie to the action, it shall bee tryed by the Ordinary and if hee be party it shall be tried by the Metropolitan. Doct. Then the Law is more reasonable in that point than I thought it had beene: but in the other point I will take aduisement in it till another time, and I pray thee shew mee thy mind in this point: If an Abbot name his conent with him in his presentation, doth that make the presentation void

void in the law, or is the presentation good that notwithstanding?

Stu. I think it is not void therefore, but the naming of them is void, and a thing more than needeth. For if the Abbot be disturbed, he must bring his action in his owne name without the couent. D. Then I perceiue well that it is not prohibited by the Law of England, but that the Abbot may name the couent in his presentation with him, and also take their assent whom hee shall present if hee will: and then I hold it the surest way, that hee so doe, for in so doing hee shall not offend neither in Law, nor conscience. St. To take the assent of the couent whom hee shall present, and to name them also in the presentation, knowing that hee may doe otherwise, both in Law and Conscience if hee will, is no offence: but if he take their assent, or name thē with him in the presentation, thinking that he is so bound to do in law and conscience, setting a conscience where none is, and regarding not the Law of the Realme, that will discharge his conscience in this behalfe, if hee will, so that he present an able man as hee may do without their assent, there is an errour, and offence of conscience in the Abbot. And in likewise if the Abbot present in his owne name, and therefore the Couent saieth that hee offendeth in conscience, in that hee obserueth not the law of the Church, for that he taketh not their assent, then they offend in iudging him to offend that offendeth not. And therefore the sure way is in this case to iudge both the said laws of such effect as they bee, & not to set an offence

of

of conſcience by breaking of the ſayde decree, which ſtandeth not in effect in this behalf within this Realme.

¶ If a man find beaſts in his ground doing hurt, whether may hee by his owne authoritie, take them and keepe them till he be ſatisfied of the hurt.

Cap. 27.

THis queſtion is made in the ſumme called Summa Roſella, in the title of reſtitution, that is to ſay, Reſtitutio 1 3. the 9. Article, and there it is anſwered, that hee may not take them for to hold them as a pledge till he bee ſatisfied for the hurt: but that hee may take them and keepe them till hee know who oweth them, that hee may thereby learne againſt whom to haue his remedie. Is not the law of the realme ſo in likewiſe? St. Mo verily, for by the Law of the Realme, hee that in that caſe hath the hurt, may take the beaſts as a diſtreſſe, and put them in a pound Duert, ſo it bee within the ſame Shire, and there let them remaine till ỹ owner will make him amends for the hurt. Do. What calleſt thou a pound Duert. Stu. A pound Duert is not onely ſuch a pound as is commonly made in Townes and Lordſhips, for to put in beaſts that bee diſtrained, but it is alſo euery place where they may bee in lawfully, not making the owner an offendour for their beeing there: And that it bee there alſo, that the owner

owner may lawfully giue the beasts meate and drinke while they be in pound.

D. And if they die in pound for lacke of meate whose ieoperdy is it? St. If it be such a pound Ouert as I speake of, it is at the peril of him that oweth the beasts, for that hee that had the hurt shal be at libertie to take his action for the trespasse if hee will: and if it be not a lawfull pound, thē it is at the peril of him that distrained, and so it is if he driue them out of the shire and they die there.

D. If I put case that he that oweth the beasts, offer sufficient amends, and the other will not take it, but keepeth the beasts still in pound, may not the owner take them out? St. No, for he may not be his owne iudge, and if he doe, an action lyeth against him for breaking of the pound: but he must sue a Replevin to haue his beasts deliuered him out of the pound, and thereupon it shall bee tried by 12 men, whether the amends that was offered were sufficient or not, and if it be found that the offer was not sufficient, then he that hath the hurt shall haue such amends as the 12 men shall assesse. D. If it bee found by the 12. men, that the amends were sufficient, shall he that refuseth to take it, haue no punishment for his refusall, and for keeping of the beasts in pound after that time? St. I thinke no, but that he shall yeld damages in the Replevin, because the issue is tried against him.

D. If I put case that the beasts after the refusall die in pound for lack of meate, at whose ieopardy is it then? Stu. At the ieopardie of him that owed

owed the beasts, as it was before: for hee is bound at his perill by reason of the wrong that was done at the beginning, to see that they have meat as long as they shalbe in pound, unlesse the Kings writ come to deliuer them, & he refuseth it: for after that time it will be at his ieopardie if they die for lacke of meat, & the damages shall bee recouered in an action brought vpon the Statute for disobeying the Kings writ.

¶ Whether a gift made by one vnder the age of xxv. yeares be good.

Cap. 28.

IT appeareth in Summa Angelica in the title donatio prima the 7. article, that a man before the age of 25. yeres may not giue, without it be with the authoritie of his tutor: but it is not so likewise at the common Law? for. The age of infants to giue, or sell their lands and goods in the Law of England is at 21. yere or aboue, so that after that age the gift is good, and before that age it is not good, by whose assent soeuer it be, except it be for his meat, & his drink or apparell, or that hee doe it as executor, in performance of the will of his testatour, or in some other like cases, that needeth not to be rehearsed here: & that age must be obserued in this realm in law & conscience, & not the said age of 25. yeare. Do. I put case, it were ordained by a decree of the Church, that if any man by his will bequeathed goods to another, & willeth that they

shalbe deliuered to him at his full age, & that in that case 25. peres shalbe taken for the full age, shall not that decree bee obserued & stand good after the law of Englande? I suppose it shall not, for though it belong to the Church to haue the probate and the execution of Testaments made of goods & chatteis, except it be in certain Lordships & seigniories that haue thē by prescription, yet the church may not as me seemeth determine what shall be the lawfull age for any person to haue the goods, for that belongeth to the King & his laws to determine: & therefore if it were ordained by a statute of the realme, hee should not in such case haue the goods till he were of the age of 25. peres, that stat. were good & to be obserued aswel in the spirituall law as in the law of the Realme, & if a statute were good in that case, then a decree made thereof is not to be obserued, for the ordring of y age may not be vnder two seueral powers, and one propertie of euery good law of man is, that the maker exceed not his authority: and I think that the spirituall iudge in that case ought to iudge the full age after the law of the Realme, seeing that the matter of the age concerneth temporal goods: and I suppose farther that as the king by authoritie of his Parliament may ordaine that all wills shall be void, & that the goods of euerie man shalbe disposed, in such maner as by statute should bee assigned, that more stronger he may appoint at what age such wills as bee made shalbe performed. D. Thinkest thou then that the King may take away the power of the Ordinarie, that he shal not call executors to ac-

compt

compt? S?. I am somewhat in doubt therein, but it seemeth that if it might be enacted by statute that all wills should be void, as is aforesaid, that then it might bee enacted, that no man should haue authoritie, to call none to accompt vpon such wills, but such as the statute shall therein appoint, for he that may do the more, may do the lesse: notwithstanding I will nothing speake determinatly in that point at this time, ne I meane not, that it were good to make a statute that all wills should be void, for I thinke them right expedient, but mine intent is, to proue ? the common law may ordaine the time of the full age, aswell in wills of temporall things as otherwise, and also that wills shalbe made And if it may so do, then much stronger it belongeth to the Kings lawes to interpret wills concerning temporall things, aswell when they come in argument before his Iudges, as when they come in argument before spirituall Iudges, & that they ought not to bee iudged by seuerall lawes (that is to say) by the spirituall Iudges in one maner, & by the Kings Iudges in another maner.

¶ If a man be conuict of heresie before the Ordinarie, whether his goods be forfeited.

Cap. 29.

IT appeareth in Sūma Angelica in the title Donatio prima the 13. article, that he that is an heretieke may not make executors for in the

law his goods be forfeit: what is the law of the realme therin? S. If a man be conuict of heresy and abiure, hee hath forfeit no goods, but if hee be conuict of heresie, & be deliuered to lay mens hands, then hath he forfeit all his goods that hee hath at that time that hee is deliuered to them, though hee be not put in execution for the heresie: but his lands he shall not forfeit, except hee be dead for the heresie, & then he shall forfeit the to the lords of the fee, as in case of felonie, except they bee holden of the Ordinarie, for then the King shall haue the forfeiture, as it appeareth by a statute made the second yere of H. 5. cap. 7. D. Mee thinketh that as it belongeth onely to the Church to determine heresies, that so it belongeth to the Church, to determine what punishment hee shall haue for his heresie, except death, which they may not be iudges in: but if the Church decree, that he shall therefore forfeit his goods, mee thinketh that they bee forfeit by that decree? S. Nay verely, for they be temporall, and belong to the iudgement of the Kings Court, and I thinke the Ordinary might haue set no fine vpon one impeached of heresie, till it was ordeined by the Statute of H. 4. that hee may set a fine in that case if hee see cause, & then the King shall haue that fine, as in the said stat. appeareth.

¶ Where diuers patrons of an Aduowson, and the Church voideth, the patrons vary in their presentments, whether the Bishop shall haue libertie to present which of the incumbents that he will, or not.

Cap.

Cap. 30.

THis question is asked in Sūma Rosella, in the title Patronus the 9. Article, & there it appeareth by the better opinion, ỹ he may prælent whether clark he will, howbeit ỹ maker of the said ium, saith by the rigor of the law, the Bishop in such case may prælent a stranger, because the patrons agræ not: & in ỹ same chap. Patronus the 15. article, it is said, ỹ hee must bee præferred that hath the most merits & hath the most part of the patrons: and if the number be egall, that thē it is to consider the merits of the patron, and if they be of like merit, thē may the Bishop command them to agree and to prælent again And if they cannot yet agree, then the liberty to prælent is given to the Bishop to take which he will: & if he may not yet prælent without great trouble, then shal the bishop order the Church in the best maner he can: & if he cannot order it, then shall he suspend the church, & take away the relicks to the rebukes of the patrōs: and if they will not so be ordered, then must he aske help of the temporalty: And in the 15. article of the said title Patronus, it is asked, whether it bee expedient in such case, that the more part of the patrons agræ, having respect to all the patrons, or that it suffice to have the more part in comparison of the lesse part, as thus, There be foure patrons to prælent one clarke: the first and second prælent one, the third prælenteth another, and the fourth another, hee this is prælented by 2. hath not ỹ more part in comparison of all the patrons, for they be egall, but hee hath the more part having respect to

the other presentments: to this question it is answered, that either the presentment is made of the that be of the colledge, & there is requisit the more part hauing respect to all the colledge, or else euery mā presenteth for himself, as commonly do lay mē ꝑ haue the patronage of their patrimonie, & then it sufficeth to haue the more part in respect of the other parties, doth not the law of England agree to these diuersities? Yes. Moreouer D. what order then shalbe taken in the law of Englād, if the patrōs vary in their presentments? A. After the lawes of England this order shalbe taken: If they be ioint tenāts, or tenāts in cōmon of ꝑ patronage, & they vary in presentment, the Ordinary is not bound to admit none of their clerks, neither ꝑ more part nor the lesse, & if the 6. moneths passe or they agree, then he may present by the laps, but he may not present within ꝑ 6. moneths, for if he do, they may agree and bring a Quare imp. against him, & remoue his clerke, & so the ordinary shal be a disturber: and if the patrons haue the patronage by discent as coperceners, then is the Ordinary bound to admit the clerk of the eldest sister, for the eldest shall haue the preferment in the law, if she will, & then at the next auoidance the next sister shall present, and so by turne one sister after another, till all the sisters or their heires haue presented, & thē the eldest sister shal begin again: and this is called a presenting by turne & it holdeth alway betweene coperceners of an aduowsō, except they agree to present together, or that they agree by composition to present in some other maner, and if they doe so, the

agree

agreement must stand: but this must be alwaye except, that if at the first auoidance that shalbe after the death of the common ancestor, ꝑ king haue the ward of the youngest daughter, ꝑ thē the king by his prerogatiue shall haue the presentment, and at the next auoidance the eldest sister, and so by turne. But it is to vnderstand that if after the death of the cōmon ancestor the Church voideth, and the eldest sister presented together with another of the sisters, & the other sisters sueth one in their owne name or together, that in ꝑ case the Ordinary is not bound to receiue none of their Clerkes, but may suffer the church to run into the laps, as it is said before: for he shall not be bound to receiue ꝑ clarke of the eldest sister, but where shee presenteth in her owne name. And in this case where the patrons varie in presentment, the Church is not properly sayd Litigious, so that the Ordinarie should be bound at his perill to direct a writ to inquire de iure patronatus: for that writ lyeth where 2. present by seuerall titles, but these patrons present all in one title, & therefore the ordinarie may suffer it to passe, if he will into the laps: and this maner of presentments must be obserued in this realme in law and conscience.

¶ How long time the patron shall haue to present to a benefice.

Cap. 31.

This question is asked in Summa Angelica in the title Ius patronatus the 16. Article, & there it is answered, that if ꝑ patrō be a lay man that he shall haue 4. moneths, and if he be a

Clarke, he shall haue 6 moneths. S. And by the common law he shall haue 6 moneths whether he be a lay man or a clarke, and I see no reason why a clarke should haue more respit than a lay man, but rather the contrarie. D. From what time shall ꝑ 6. moneths be accompted? S. That is in diuers maners after the maner of the voidance, for if the church void by death, creation, or cession, the 6 moneths shall be counted from the death of the incumbent, or from the creation, or cession, whereof the patron shall be compelled to take notice at his perill: & if the voydance be by resignation or depriuation, thē the 6 moneths shall begin when the patron hath knowledge giuen him by the Bishop of the resignation or depriuation. D. What if hee haue knowledge of the resignation or depriuation, and not by the Bishop, but by some other, shall not the sixe moneths begin then from the time of that knowledge? S. I suppose that it shall not begin till he haue knowledge giuen him by the Bishop. D. An vnion is also a cause of voidance, how shall the sixe moneths be reckoned there? S. There can no vnion be made but the patrons must haue knowledge, and it must bee appointed who shall present after that vnion, ꝑ is to say, one of them or both, either iointly or by turne one after another, as the agreement is vpon the vnion, and vnlesse the patron is priuie to the auoidance, and is not ignorant of it, the sixe moneths shall bee accompted from the agreement. Doct. I see well by the reason that thou hast made in this Chapter, ꝑ ignorance sometime excuseth in the Law of England, for in some

some of the said auoydances it shall excuse the patrons, as it appeareth by the reasons above, and in some it shall not: Wherefore I pray thee shew me somewhat where ignorance excuseth in the Law of England, and where not after thine opinion Sr. I will with good will hereafter doe as thou sayest if thou put mee in remembrance thereof. But I would yet moue thee somewhat further in such questions as I haue mooued thee before, concerning the diuersities betweene the lawes of England and other lawes: for there be many moe cases thereof, that as mee seemeth haue right great needs, for the good order of conscience of many persons, to be reformed, and to bee brought into one opinion both among spirituall and temporall: as it is in the case where Doctors hold opinion, that the statute of lay men that restraine libertie to giue lands to the Church should be void, & they say farther, that if it were prohibit by a stat that no gift should bee made to forreines that yet a gift made to the church should be good, for they say, that the inferiour may not take away the authoritie of the superiour, & this saying is directly against the statutes, whereby it is prohibit, that lands should not be given into Mortmain: & they say also that bequests & gifts to ꝑ church must be determined after the law Canon, & not after the lawes & statutes of lay men, and so they regard much to whom the gift is made, whether to the Church, or to make causeways, or to cõmon persons, & beare more fauor in gifts to the Church than to other: and the law of the Realme beholdeth the thing that is

given

giuen and pretended, that if the thing that is giuen be of lands or goods, that the determination thereof, of right belongeth in this realme to the Kings lawes, whether it be to spirituall men or temporall, to the church, or to other, and so is great diuision in this behalf, whē one preferreth his opinion, and another his, & one this iurisdiction, & another that, and that as it is to feare more of singularity thā of charity: wherfore it semeth, that they that haue the greatest charge ouer the people, specially to ꝑ health of their soules, are most bound in conscience before other to looke to this matter, & to doe that in thē is in all charitie to haue it reformed, not beholding the temporall iurisdiction nor spirituall iurisdiction, but the common wealth, & quietnesse of the people: & that vndoubtedly would shortly follow, if this diuision were put away, which I suppose verily will not be, but ꝑ all men within the realme both spirituall & temporall be ordred & ruled by one law. as to tēporall things: Notwithstanding forasmuch as the purpose of this writing is not to treat of this matter, therfore I will no farther speake therof at this time. Do. Then I pray thee proceed to another question, that thou saiest thy mind is to do. S. I will with good will.

¶ If a man bee excommenged, whether he may in any case be assoiled without making satisfaction.

Cap. 32.

IN the summe called Summa Rosella, in the title Absolutio quarta, the second article, it is

sayd

said, that he that is excommunicat for a wrong if hee bee able to make satisfaction, ought not to be assoiled but he doe satisfie, & that they offend that do assoile him, but yet neuertheles he is assoyled, & if he be not able to make amends, that he must yet be assoyled, taking a sufficient gage to satisfie if he be able hereafter, or else that he make another to satisfie if he be able. And these sayings in many things hold not in the Lawes of England. D. I pray thee shew me, wherein the law of the realme varieth therefore. Sr. If a man be excommunicat in the spirituall court for debt, trespas, or such other things as belong to the kings crowne, and to his royall dignity, there hee ought to be assoyled without making any satisfaction, for the Spiritual court exceedeth their power in that they held plee in those cases, & the party if he will may thereupon haue a Premunire facias, aswell against the partie that sued him, as against the Iudge: & therfore in this case they ought in conscience to make absolution without any satisfaction, for they not onely offended the partie in calling him to answer before them of such things as belong to the law of the Realme, but also the king: for he by reason of such vses, may leese great aduantages, by ꝑ reason of the writs originals, iudicials, fines, amerciaments, & such other things as might grow to him if suits had bin taken in his courts according to his lawes: & according to this saying it appeareth in diuers statutes, that if a man lay violent hands vpon a clerke, and beat him, that for the beating amends shall be made in the kings court, and for the laying

of

of violent hands vpon the Clarke, amends shal be made in the Court christian. And therfore if the Iudge in the court christian would award the party to yeild damages for the beating, hee did against the statute. But admit that a man be excommenged for a thing that the spirituall Court may award the party to make satisfaction of, as for the not inclosing of the Church yard, or for not apparelling of the church conuenientlie: Then I think the party must make restitution, or lay a sufficient caution if he be able or he be assoiled: but if ỹ party offer sufficient amends, and haue his absolution, and the Iudge will not make him his letters of absolution, if the excommengement be of Record in the Kings Court, then the king may write vnto the spirituall Iudge, commaunding him that he make the partie his Letters of absolution vpon paine of contempt: & if the said excommunication be not of Record in the Kings Court, then the party may in such case haue his action against the Iudge spirituall, for that he would not make him his Letters of absolution: but if he be not assoiled, or if he be not able to make satisfaction, and therefore the Iudge spirituall will not assoiled him, what the Kings Lawes may do in this case I am somwhat in doubt, & will not much speake of it at this time, but as I suppose, he may aswell haue his actiõ in that case for the not assoiling him, as where he is assoiled, and that the Iudge will not make him his Letters of absolution: and I suppose the same law to be where a man is accursed for a thing that ỹ Iudge had no power to accuse him

him in, as for Debt, Treſpaſſe, or ſuch other. Do. There he may haue other remedies, as a Præmunire facias, or ſuch other, and therfore I ſuppoſe the other action lyeth not for him.

St. The Iudge and the party may be dead, & then no Præmunire lyeth, & though they were alliue, and were condemned in Præmunire, yet that ſhould not auoid the excommengement: & therefore I thinke the action lyeth, ſpecially if he be thereby delayed of actions that hee might haue in the Kings Court, if the ſaid excommengement had not bin.

¶ Whether a Prælat may refuſe a Legacie.

Cap. 33.

IT is mooued in the ſaid ſum, named Roſella in the title Alienatio 20 the 11. article, whether a prelat may refuſe a legacie, wherein diuers opinions bee recited there, which as mee thinketh, haue need after the laws of the realme to be more plainly declared. D. I pray thee ſhew me what the law of the realme will therein. St. I thinke that euery Prelat and ſouereign that may onely ſue, and bee ſued in his owne name, as Abbots, Priors, and ſuch other, may refuſe any legacie that is made to the houſe: for the legacie is not perfect till hee to whom it is made aſſent to take it, for elſe if hee might not refuſe it, hee might bee compelled to haue lands whereby he might in ſome caſe haue great loſſe

but

but then if he intend to refuse, he must as soone as his title by the legacie falleth, relinquish to take the profits of the thing bequeathed, for if one take the profits therof, he shall not after refuse the legacie: but yet his successor may if hee will refuse the taking of the profits to saue the house from yeelding damages, or from arrerages of rēts, if any such be: a like law is of a remainder, as is in legacie, for though in ỳ case of a remainder, & also of a deuise as most men say, the freehold is cast vpon him by the law when the remainder or deuise falleth: yet it is in his liberte to refuse the taking of the profits, and to refuse the remainder if he will as he might do of a gift of lands, or goods, for if a gift be made to a man that refuseth to take it, the gift is void, & if it be made to a man that is absent, the gift taketh no effect in him till hee assent: no more than if a man disseise one to another mās vse, hee to whose vse the disseisin is made, hath nothing in the land, ne is no disseisor till hee agree: And to such disseisins & gifts, an Abbot or Priour may disagree, aswell as any other mā. But after some men a bishop, of a deuise, or remainder that is made to the bishop, and to the Deane and Chapter, nor a Deane and a chapter of a deuise, or remainder made to them, ne yet the master of a colledge of such a deuise, or remainder made to him & to his brethren, may not disagree without the Chapter or brethren: for the Bishop of such land as hee hath with the Deane and chapter, ne the Deane nor master of such land as they haue with the Chapter or brethren may not answere without

the chapter & brethrē: & therefor some say that if the Deane or master will refuse, or disclaime in the lands that they haue by the deuise or remainder, that disclaimer without the chapter or brethren is void. And therefore it is holden in the law, that if a Bishop be vouched to warrant, & the tenant bindeth him to the warranty by reason of a lease made to him by the Bishop, and by the Deane & the chapter, yeelding a rent, that in that case the Bishoppe may not disclaime in the reuersion without the assent of the Deane and Chapter: But yet if a reuersion were graunted to a Deane & a Chapter, and the Deane refuse, the graunt is void. And so it appeareth that the Deane may refuse to take a gift, or graunt of lands, or goods, or of a reuersion made to him and to the chapter, and yet he may not disagree to a remainder, or deuise, & the diuersitie is because the remainder and deuise be cast vpō him without any assent, whereupon neither the Deane or the Chapter by themselues, may in no wise disagree without the assent of the other: But a gift or grant is not good to them without they both assent, and in such gifts, as I suppose, an Infant may disagree aswell as one of full age, but if a woman couert disagree to a gift, and the husband agree, that gift is good. D. What if the lands in that case of a mā and his wife be charged with damages, or bee charged with more rent than the land is worth, and the husband dye, shal the wife be charged to the damages, or to the rent? St. I thinke nay, if the wife refuse the occupation of the ground after her husbands death,

and

and I thinke the same law to be, if a lease be made to the husband and the wife, yeelding a greater rent than the land is worth, that the wife after the husbands death may refuse the Lease to saue her from the payment of the rent, & so may the successour of an Abbot. D. And if the husband in that case ouerliue the wife, & hee make his executors and die, whether may his executors in likewise refuse the lease? I. If they haue goods sufficient of their testator to pay the rent, I thinke they may not refuse it: but if they haue not goods sufficient of their testator to pay the rent to the end of the terme, I thinke if they relinquish the occupation, they may by speciall pleading discharge themselues of the rent & the leafe, & if they doe not, they may lightly charge themselues of their owne goods. And if a leafe bee made for terme of life, the remainder to an Abbot for terme of life of I. at S reseruing a greater rent than the land is worth, after the tenant for terme of life dieth, the Abbot may refuse the remainder for the cause before rehearsed: and in case that the Abbot assent to the remainder, whereby hee is charged to the rent during the time that hee is Abbot, and after hee dyeth or is deposed, liuing the said I. at S in that case his successor may discharge himselfe by refusing the occupation of the land, as is aforesaid. But I thinke that if such a remainder were made to a Deane, and to the Chapter, and the Deane agree without the assent of the Chapter, that in that case the Deane and the Chapter may afterwards disagree to the remainder, and that the act of the Deane

with-

out the assent of the Chapter shall not charge the Chap. in ỳ behalfe. And thus it appeareth, though the meaning of the said chapter & article in the said summe be, that a Prelat may not disagree vnto a legacie, for hurting of a house, yet he may after the lawes of the realm disagree thereto, where it should hurt his house. And if in a Præcipe quod reddat, there be but one tenãt be he spirituall or tempozall, & he refuse by way of disclaimer, in such case where hee may disclaime by the law, there the land shal vest in the remandant: & if there be 2. tenants, then it shal vest in his fellow, if hee will take the whole tenancy vpon him, or els it shall vest in the demãdant. But if an Abbot or lay man refuse the taking of the profits, and shew a speciall cause why it should hurt him if he do assent, and bee thereby discharged as is said before: in whom the land shall then vest it is more doubt, wherof I will no farther speak at this time. And thus it appeareth by diuers of the cases that be put in this chapter, that hee that is ignorant in the law of the realm, shall lacke the true iudgement of conscience in many cases. For in many of these cases that may be done therein by the law, must also be obserued in conscience &c.

¶ Whether a gift made vnder a condition be void if the soueraigne onely breake the condition.

Cap. 34.

IN summa Rosella in the title Alienatio, the 12. article, is asked this question, whether a gift

made vnder a certaine forme may bee auoyded or reuoked, because the prelates or soueraigne onely did breake the forme, and it is there answered, that it may not, for that the deed of the Prelate onely ought not to hurt the Church: and if those words (vnder a maner) bee vnderstood of a gift vpon condition as they seeme to bee, then the said solution holdeth not in this realme neither in law nor conscience. D. What is then the law of England if a man enfeoffe an Abbot by deede indented, vpon condition, that if the Abbot pay not the Feoffor a certaine summe of money at such a day, that then it shall bee lawfull to the feoffor to reenter, and at that day the Abbot faileth of his payment, may the Feoffor lawfully reenter and put out the Abbot?

S. Yea verily, for he had no right to the land, but by the gift of the Feoffour, and his gift was conditional, & therfore if the condition be broken, it is lawfull by the law of England for the feoffor to reenter, and to take his land again & to hold it as in his first estate: by which reentrie after the lawes of the realme, he dispossesseth the first liuerie of seisin, and all the meane acts done betweene the first feoffement and the reentry: and it forceth little in the Law, in whom the default be that the condition was not performed whether in the Abbot or in his conuent, or in both, or in any other person whatsoeuer he bee, except it bee in the feoffor himselfe. And it is great diuersitie betweene a cleere gift made to an Abbot without condition, and where it is made with condition: for why? it is made without

out

out condition, the act of the Abbot onely shall not by the common law disherit the house, but it bee in verie few cases: but yet vpon diuers statutes the sufferance of the Abbot onely may disherit the house, as by his ceasser, or by leuying of a ceasse vpon a house against the tenure thereof made, in which case the house thereby shall leese the land, and some say that by the common law vpon his disclaimer in auowrie, a writ of right of disclaimer lyeth, but if the gift bee vpon condition, it standeth neither with law nor conscience, that the Abbot should haue any more perfect or sure estate than was giuen vnto him: and therefore as the said estate was made to the house vpon condition, so that estate may be auoided for not performing of the condition. And I thinke verily that this I haue said is to be holden in this realme, both in the Law and conscience, and that the decrees of the Church to the contrarie, bind not in this case. But if the lands bee giuen to an Abbot, and to his Conuent, to the intent to find a lamp, or to giue certaine almes to poore men, though the intent be not in those cases fulfilled, yet the feoffor, nor his heire may not reenter: for hee reserued no reentrie by expresse words, ne in the words, when he said, to the intent to find a Lampe, or to giue almes &c. is implyed no reentrie, ne the feoffor, nor his heires shall haue no remedie in such cases, vnlesse it bee within the case of the statute of Westminst. the secõd, that giueth the Cessauit de Cantaria.

Whether a couenant made vpon a gift to the Church, that it shall not bee aliened, be good.

Cap. 35.

In the said summe, called summa Rosella, the said title Alienatio, the 13. article, is asked this question, whether a couenant made vpō a gift to the Church, that it shall not be aliened, be good. And the same questiō is moued againe in the said summa called Rosella, in the tytle Cōditio the first article, & in summa Angelica, in the title Donatio prima, the 51. & 52. articles, & thintent of the question there, is whether notwithstāding that the condition be good to some alienations, whether that yet it be good to restraine alienations for the redemption of thē ꝑ bee in captiuity vnder the Infidels, or for the greater auantage of the house: and though the better opinion be there, ꝑ the cōdition may not bee broke for redēption of them that be in captiuitie, yet it is in maner a whole opinion that it may be sold for the greater auantage to the house: for it is said there that it may not be taken, but that the intent of the giuer was so and therefore they call the condition that prohibiteth it to be sold, conditio turpis, that is to say, a vile condition, wherefore they regard it not: but verily as I take it, if a condition may restraine any maner of alienation, then it shall as well restraine Alienations for the two causes before rehearsed, as for any other causes: and though me thinketh that the condition is good, & after

after the lawes of the Realme, that vpon gifts to the Church restraineth alienations, yet I shall touch one reason that is made to the contrarie, that is this: There is a cleere ground in the law, that if a feoffement be made to a common person in fee, vpon condition that the feoffee shall not alien to no man, that condition is voyd, because it is contrarie to the estate of a fee simple, to bind him that hath the estate, that hee should not alien if he list: and some say that an Abbot that hath land to him and to his successors hath as high and as perfit a fee simple as hath a lay man that hath Land to him and to his heires, and therefore they say, that it is as well against the Law of the Realme to prohibite that the Abbot shall not alien, as it is to prohibit a lay man thereof: and though it bee therein true as they say, as to the highnesse of the estate, yet mee thinketh there is a great diuersitie betweene the cases concerning their alienations: for when lands be giuen in fee simple to a common person, the intent of the Law is that the feoffee shal haue power to alien, and if he doe alien, it is not against the intent of the Law, ne yet against the intent of the feoffor: but when lands be giuen to an Abbot and to his successors, the intent of the law is, and also of the giuer (as it is to presume) that it should remaine in the house for euer, and therefore it is called Mortmain, that is to say, a dead hand, as who saith that it shall abide there alway as a thing dead to the house. And therefore as I suppose the law will suffer that condition to be good, that is made to restraine that such Mort-

main should not be alienedy, and that yet it may prohibite the same condition to bee made vpon a feoffement made in fee simple to a man & to his heires: for that is the most high, the most free, & the most pure estate that is in the Law. But the Law suffereth such a condition to bee made vpon a gift in taile because the Statute prohibiteth that no alienation should bee made thereof. And then, as the Law suffereth such a condition vpon gift in Mortmain, that is to say, that it shall not be alienedy, to be good: then it iudgeth the condition also according to the words, that is to say, if the condition bee generall that they shall alien to no man, as this case is, that it shalbe taken generally according to the words, and it shall not be taken, that the intent of the giuer was otherwise than hee expressed in his gift: though percase if hee were alive himselfe and the question were asked him whether hee would bee contented it should bee alienedy for the said two causes or not, hee would say ye, but when he is dead no man hath authoritie to interpret his gift otherwise than the law suffreth, nor otherwise than the words of the gift bee. And if the condition be special that is to say, that the land shall not bee alienedy to such a man or such a man, then the condition shall bee taken according to the words, & then they may bee alienedy as for that condition to any other, but to them to whom it is expressely prohibited that the land should not bee alienedy to. And if the Lands in that case be alienedy to one that is not excepted in the condition, thē hee may alien the land to him that is first excepted

without breaking of the condition, for conditions be taken straitly in the law and without equitie. And thus me thinketh, that because the said condition is generall, and restraineth all alienations, that it may not bee altered neither by the law of the Realme, ne yet by conscience, no more for the sayd two causes, than it may for any other cause: and this case must of necessitie bee iudged after the rules and grounds of the Law of the Realme, and after no other Law as mee seemeth.

¶ If the Patron present not within 6. moneths, who shall present.

Cap. 36.

IN the same sum, called Summa Rosella, in the title Beneficium, in principio, it is asked, if the patron present not within six moneths, who shall present, and within what time the presentment must be made. And it is aunswered there, that if the patron present not within sixe moneths, that the Chapter shall haue sixe moneths to present, and if the Chapter present not within sixe moneths, that then the Bishop shall haue other sixe moneth: And if he be negligent, then the Metropolitan shall haue other sixe moneths, and if present not, then the presentment is deuolte to the Patriarke: And if the Metropolitan haue no superior vnder the Pope, then the presentment is deuolte to the

Pope. And so, as it is said ther, the Archbishop shall supply the negligence of the Bishop, if he be not exempt, and if he be exempt, the presentment immediatly shall fall vpon the Bishop, to the Pope. And as I suppose these diuersities hold not in the lawes of the realme. Do. Then I pray thee shew mee who shall present by the Lawes of the realme, if the patron do not present within 6 moneths? Stu. Then for default of the patron the bishop shall present vnles the King be patron, and if the Bishop present not within sixe moneths, then the Metropolitan shall present, whether the Bishop be exempt or not. And if ỹ Metropolitan present not within the time limited by the Law, then there bee diuers opinions who shall present, for some say the Pope shall present, as it is said before, and some say the King shall present.

D. What reason make they that say the king should present in that case? St. This is their reason, they say that the King is patron paramount of all the benefices within the realme. And they say farther, that the King and his progenitors kings of England, without time of mind, haue had authoritie to determine the right of patronages in this Realme in their owne Courts, and are bound to see their Subiects haue right in that behalfe within the realme, and that in that case from him lyeth no appeale. And then they say, that if the Pope in this case should present, that then the King should not onely lese his Patronage paramount, but also that he should not sometime bee able to doe right to his subiects.

D. In

D. In what case were that? S. It is in this case: The Law of the Realm is, that if a benefice fall void, & the patron shall present within 6. moneths, and if he doe not, that then the Ordinarie shall present, but yet the Law is farther in this case, that if the Patron present before the Ordinarie put in his Clerke, that then the Patron of right shall enioy his presentment, and so it is though the time should fall after to the Metropolitan, or to the Pope: and if the presentment should fall to the Pope, then though the Advowson abode still void, so that the Patron might of right present, yet the Patron should not know to whom hee should present, unlesse hee should goe to the Pope, and so hee should faile of right within the Realme. And if percase hee went to the Pope, and presented an able Clerke vnto him, and yet his Clerke were refused and another put in at the collation of the Pope, or at the presentment of a straunger, yet the Patron could haue no remedie for the wrong within the Realme, for the Incumbent might abide still out of the Realme. And therefore the law will suffer no Title in this case to fall to the Pope. And they say, that for a like reason it is, that the Law of the Realme will not allow an excommunegement that is certified into the Kings Court vnder the Popes Bulles: For if the partie offered sufficient amends, and yet could not obtaine his letters of absolution, the King should not know to whom to write for the letters of Absolution, and the party could not haue right, and that the Law will in no

swile suffer. Doct. The patron in that case may present to the Ordinarie as long as the church is void, and if the ordinary accept him not, the Patron may haue his remedie against him within this Realm. But if the Pope will put in an Incumbent before the patron present, it is reason that he haue the presentment, as mee seemeth before the king. S. When the Ordinarie hath surcessed his time, hee hath lost his power as to that presentment, specially if the collation bee deuolte to the Pope. And also when the presentment is in the Metropolitan hee shall put in the Clerke himselfe, and not the Ordinarie: and so there is no default in the Ordinarie, though he present not the Clerke of the Patron, if his time be past, and so there lyeth no remedie against him for the Patron.

D. Though the Incumbent abide still out of the realme, yet may a Quare impedit lie against him within the realme: and if the Incumbent make default vpon the distresse, and appeare not to shew his title, then the patron shall haue a writ to the Bishop according to the statute, and so he is not without remedie.

S. But in this case hee cannot be summoned attached, nor distrained, within the Realme. D. He may be summoned by the church, as the tenant may in a Writ of right of Iouowson. S. There the aduowson is in demaund, & here the presentment is onely in debate: and so hee cannot bee summoned by the Church here no more than if it were in a writ of Annuity, and there the common returne is, quod Clericus est beneficiatus, non habens laicum tecū vbi potest sum-

summoneri. And though he might bee summoned in the Church, yet he might neither be attached nor distrayned there, and so the patron should be without remedie D. And if he were without remedie, hee should yet bee in as good case as he should be if the King should present: for if the title should be given to the King, the Patron had lost his presentment clerly for the time, though the church abide still void. For I have heard say that in such presentments no time after the Law of the Realme runneth vnto the King. St. That is true, but there the presentment should be taken from him by right and by the Law, and here it should be taken from him against the Law, and there as the Law could not help him, and that the law will not suffer D. Yet me thinketh alway that the title of the Laps in such case is given by the law of the Church, & not by the tempozall law, & ther fore it forceth but little what ȳ tempozall law will in it, as me seemeth. S. In such countries where the Pope hath power to determine the right of temporal things, I thinke it is as thou saist, but in this Realme it is not so. And ȳ right of presentment is a tempozal thing, and a temporal inheritance, & therfore I think it belongeth to the Kings law to determine, & also to make Laws who shall present after 6. moneths aswell as before, so that the title of examination of abilitie or nonabilitie bee not therby taken from the Ordinarie. And in likewise it is of avoidance of benefices, that is to say, then it shalbe iudged by the kings Lawes when a benefice shall be said void, & when not,

and

and not by the law of the Church, as when a parson is made a Bishop, or accepteth another benefice without a Licence, or resigneth, or is deprived, in these cases the common law saith, that the benefice is void, and so they should bee, though a law were made by the Church to the contrarie: and so if the Pope should haue any title in this case to present, it should bee by the Law of the Realme. And I haue not seene ne heard that the law of the Realme hath giuen any title to the Pope to determine any temporall thing that may bee lawfully determined by the Kings Court. D. It seemeth by that reason that thou hast made now, that thou preferrest the Kings authoritie in presentments before the Popes, & that me thinketh should not stand with the law of God, sith the Pope is the Vicar generall vnder God. Stu. That I haue said proueth not, that for the highest preferment in presentments hee is to haue authoritie to examine the abilitie of the Parson that is presented: for if the presentee be able, it sufficeth to the discharge of the Ordinarie, by whom soeuer hee be presented, and that authoritie is not denied by the law of the Realme to belong alway to the spirituall iurisdiction. but my meaning is, that as to the right of presentments, and to determine who ought to present, and who not, and at what time, and when the Church shall be iudged to be void, & when not, belong to the King and to his lawes: for else it were a thing in vaine for him to hold plee of Aduowsons, or to determin the right of patronage in his owne courts, and not to haue authoritie to determine

the

the right thereof, and those claimes seemeth not to be against the Law of God. And so mee seemeth in this case the presentment is giuen the King. D. And if the King should haue right to present, then might the Church happen to cõtinue void for euer, for as wee haue said before no time runneth to the King in such presentment. St. If any such case happen, if the King present not, then may the Ordinary set in a deputy to serue the cure as he may do when negligence is in other patrons that may present & doe not: and also it cannot bee thought that the King which hath the rule and gouernãce ouer the people, not onely of their bodies, but also of their soules, will hurt his conscience and suffer a benefice cõtinually to stand without a Curat, no more than he doth in Aduowsons that be of his owne presentment.

¶ Whether the presentment and collation of benefices and dignities, voiding at Rome belongeth onely to the Pope.

Cap. 37.

IN the same sum, called Sũma Rosella, in the title Beneficium primũ, in the 13. article, It is said ỹ benefices, dignities, & parsonages, voiding in the court of Rome may not be giuẽ but by the Pope: & likewise of the Popes seruants and of other that come and goe from the Court, if they die in places nigh to the Court within two daies iourney, all these belong to the Pope: but if the Pope present not with-

in

in a month, then after the moneth they to whom it belongeth to present, may present by themselues onely, or by their vicar generall if they be in far parts: and these sayings hold not in the law of the Realme. Do. What is the cause that they hold not in this realme, aswell as in all other realmes? Stu. One cause is this: The king in this realme according to the ancient right of his Crowne, of all his aduowsons that bee of his patronage ought to present. And in likewise other Patrons of benefices of their presentment, & the pleas of ye right of presentments of benefices within this Realme, belong to the King and his crowne. And these titles cannot bee taken from the King and his subiects, but by their assent, and the law that is made therein to put away the title, bindeth not in this realme. And ouer that, before the statute of 25. E. 3. there was a great inconuenience and mischiefe, by reason of diuers prouisions & reseruations, that the Pope made to the benefices of this Realme, contrarie to the old right of the King and other patrons of this Realme. aswell to the Archbishoprickes, Bishoprickes, Deanries and Abbies, as to other dignities & benefices of the Church: And many times aliens thereby had benefices within the Realme that vnderstood not the English tongue, so that they could not counsaile ne comfort the people, when need required, and by that occasion great riches was conueyed out of the Realme: wherfore to auoid such inconuenience, it was ordained by the said statute, that all patrons aswell spirituall as temporall should haue the presentments

ments freely: in case the collation or prouision were made by the Pope in disturbance of any Spirituall Patron, that then for that time the King should haue the presentment, & if it were in disturbance of any lay Patron, that then if the patron presented not within the halfe yeare after such voidance, nor the Bishop of the place within a moneth after the halfe yeare: that then the king should haue also the presentment, and that the king should haue the profits of the benefices so occupied by prouision, except Abbeis and Priories, & other houses that haue colledge and couēt, & there the colledge & couent to haue the profits: and because the statute is generall, & excepteth no such benefices as shall void in the Court of Rome, or in such other place as before appeareth, therefore they be taken to bee within the prouision of the said statute aswell as the benefices that void within the Realme: & all prouisors and executors of the said collations & prouisions, & all their atturnies, notaries & maintainers, shalbe out of the protection of ỹ king, & shall haue like punishmēt as they should haue for executing of benefices voyding within the realm. D. But I cannot see how the said statute may stand with conscience, that so farre restrained the Pope of his libertie, which as mee seemeth hee ought in this case of right to haue. St. Because (as I suppose) that patrons ought of right to haue their presentments, vnder such manner as they claime them in this realme, as I haue said before, and as in the 26. chapter of this booke appeareth more at large: And also forasmuch as it appeareth evidently,

that

that great inconuenience followed vpon the said prouisions, and that the said statute was made to auoide the same, which sith that time hath beene suffered by the Pope, and hath been alwaye vsed in this realme without resistance, that the said statute should therfore stand with good conscience.

¶ If a house by chaunce fall vpon a horse that is borrowed, who shall beare the losse.

Cap. 38.

IN the said summe called Summa Rosella, in the title Casus fortuitus, in the beginning is put this case. If a man lend another a horse, which is called there Depositum, & a house by chance falleth vpon the horse, whether in that case hee shall answere for the horse? And it is answered there, that if the house were like to fall, that then it cannot be taken as a chance, but as the default of him that had the horse deliuered to him: But if the house were strong, & of likelyhood and by common presumption in no daunger of falling, but that it fell by sodaine tempest, or such other casualtie, that then it shall bee taken as a chance, and hee that had the keeping of ȳ horse shal be discharged: & though this diuersitie agreeth with the Lawes of the Realme, yet for the more plainer declaration therof, and for the more like cases and chances that may happen to goods, that a man hath in

in his keeping that be not his owne, I shall add a little more thereto, that shalbe somwhat necessarie as mee thinketh to the ordering of conscience. First a man may haue of another by way of lone or borrowing, money, corne, wine, and such other things, where the same thing cannot be deliuered if it be occupied, but another thing of like nature and like value must be deliuered for it, & such things he that they be lent to, may by force of the lone vse as his owne. And therefore if they perish, it is at his ieopardie, & this is most properly called a lone. Also a man may lend to another a horse, an ore, a cart, or such other things that may be deliuered againe, and they by force of that lone may be vsed and occupied reasonably in such manner as they were borrowed for, or as it was agreed in the time of the lone that they should be occupyed, & if such things be occupied otherwise thã according to the intent of the lone, & in that occupation they perish, in what wise soeuer they perish, so it be not in default of the owner, hee that borrowed them shall be charged therwith in law & conscience: & if he that borrowed them occupy thẽ in such manner as they were lent for, & in that occupation they perish in default of him that they were lent to, then hee shall aunswere for them: and if they perish not through his default, then hee that oweth them shall beare the losse. Also if a man haue goods to keepe to a certaine day, for a certaine recompence for the keeping, hee shall stand charged or not charged, after as default or not default shall bee in him as before appeareth, and so it is if hee haue nothing

for the keeping, but if hee haue for the keeping, & make promise at the time of ꝑ deliuerie to redeliuer them safe at his perill, then he shall bee charged with all chances that may fall. But if he make that promise & haue nothing for keeping, I thinke he is bound to no such casualties but that he wilfull & his owne default, for that is a nude, or a naked promise, whereupon as I suppose no action lieth. Also if a man find goods of another, if they bee after hurt or lost by wilfull negligence, he shalbe charged to the owner, but if they be lost by other casualty, as if they be laied in a house that by chaunce is burned, or if hee deliuer them to another to keepe ꝑ runneth away with them, I think he be discharged: and these diuersities hold most cõmonly vpon pledges, or where a man hireth goods of his neighbor to a certain day for certain money: & many other diuersities bee in the law of the Realme, what shall be to the iopardie of the one, & what of the other, which I will not speake of at this time: And by this it may appeare that it is cõmonly holde in the laws of England if a common carter go by the wates that be dangerous for robbing, or drive by night, or in other incõuenient time, & be robbed, or if he ouercharge a horse, whereby hee falleth into the water or otherwise, so that the stuffe is hurt or impaired: that hee shall stand charged for his misdemeanour, and if hee would percase refuse to carry it, vnlesse promise were made vnto him that he shall not bee charged for no misdemeanour that should bee in him, the promise were void: For it were against reason & against good maners,

and

and so it is in all other cases like. And all these diuersities be granted by secondary conclusions deriued vpon the Law of reason, without any statute made in that behalfe. And peraduenture lawes, and the conclusions therein, be the more plaine & the more open. For if any statute were made therin, I thinke verily no doubts & questions would rise vpon the Statute, than doth now when they be only argued & iudged after the common law.

¶ If a Priest haue won much goods by saying of Masse, whether hee may giue those goods or make a will of them.

Cap. 39.

IN the said sum called Summa Rosella in the title Clericus quartus the third article, is asked this question: If a priest haue won much goods by saying of masse, whether he may giue those goods, or make a will of them? whereto it is answered there, that hee may giue them, or make a will of them, specially when a man bequeths money for to haue Masses said for him: & the like law is of such things as a clerke winneth by the reason of an office: For it is sayd there, that such things come to him by reason of his owne person: which sayings I think accord with ꝑ law of ꝑ realm But for asmuch as in the said article & in diuers other places of ꝑ said chapter, & in diuers other chapters of the said Summe, is put great diuersitie betweene such goods, as a Clerke hath by reason of his

church, and such goods as hee hath by reason of his person, & that hee must dispose such goods as he hath by reason of his church in such maner as is appointed by the law of the Church, so that he may not dispose them so liberally, as he may the goods þ comr by reason of his owne person, therefore I shal a little touch what spirituall men may doe with their goods after the law of the Realme.

First a Bishop, of such goods as he hath with the Deane and Chapter, hee may neither make gift nor bequest, but of such goods as hee hath of his owne by reason of his church, or of þ gift of his auncestors or of any other, or of his patrimony, hee may both make gifts and bequests lawfully. And an Abbot of the goods of his Church may make a gift, and that gift is good as to the Law: But what it is in conscience, that is after the cause and intent and quantitie of the gift, for if it bee so much that it notably hurteth the house or the couent, or if he giue away the bookes, or the chalices, or such other things as belong to the seruice of God, he offendeth in conscience, and yet hee is not punishable in the Law, ne yet by Subpena after some men, ne in none otherwise but by the Law of the church, as a waster of the goods of his monasterie. But nevertheless I will not fully hold that opinion, as to that that belongeth necessarily to the seruice of God, whether any remedy ipe against him or not, but remit it to the iudgement of other. And of a Deane & Chapter, and a Master & brethren of goods that they haue to themselues, & also of goods that they haue with the

the Chapter & brethren, the same diuersitie holdeth, as appeareth before of a Bishop and the Deane & Chapter, except that in the case of a Master & brethren the goods shalbe ordered as shalbe assigned by the foundation. And moreouer, of a Parson of a Church, Vicar & Chantry Priest, or such other, all such goods as they haue aswell such as they haue by reason of the Parsonage, Vicarage, or Chauntrie, as that they haue by reason of their owne person, they may lawfully giue and bequeath where they will after the common law: And if they dispose part among the parishioners, & part to the building of Churches, or giue part to the Ordinarie or to poore men, or in such other manner, as it is appointed by the law of the church, they offend not therein, vnlesse they think themselues bounden thereto by dutie, & by authoritie of the law of the church, not regarding the Kings Lawes, for if they do so, it seemeth they resist the Ordinances of God, which hath giuē power to princes to make lawes: but there as the Pope hath soueraignty in temporall things, as hee hath in spirituall things, there some say that the goods of Priests must in conscience be disposed as is contained in the said summe, but that holdeth not in this Realme: for the goods of spirituall men bee temporall in what manner soeuer they come to them, & must be ordered after the temporall law as the goods of the temporall men must be. Howbeit if there were a Statute made in this case of like effect in many points, as the law of the Church is, I thinke it were a right good and a profitable Statute.

¶ Who shall succeed a Clerke that dyeth intestate.

Cap. 40.

IN the said Summa called Rosella in the chapter Clericus quare the 7. Article, is asked this question, who shall succeed to a Clerke that dyeth intestat, & it is answered, that in goods gotten by reason of the church, the church shall succeed. But in other goods his kinsmen shall succeed after the order of the law, & if there bee no kinsman, then the church shall succeed. And it is said further, that goods gotten by a Canon secular by reason of his church or prebend shall not go to his successor in the prebend, but to the Chapter. But where one that is beneficed is not of the congregation, but hee hath a benefice clérely seperate, as if he be a parson of a parish Church, or is a president, or an Archdeacon not beneficed by the Chapter, then the goods gotten by reason of his benefice, shall go to his successor, & not to the Chapter, and none of these sayings hold place in the Lawes of England D. What is then the Law, if a Parson of a Church, or a Vicar in the Countrie dye intestate, or if a Cannon secular bee also a Parson and have goods by reason thereof, and also by a Prebend that he hath in a Cathedrall Church, & bee dye intestate, who shall have his goods? S. In the common Law the Ordinary in all these cases may administer the goods, and after hee must commit administration to the

next

next faithfull friends of him that is dead intestate that will desire it, as hee is bound to do where lay mē ȳ haue goods die intestate. And if no man desire to haue administration, then the Ordinarie may administer, & see the debts payed, and hee must beware that he pay the debtes in such order as is appointed in the common Law: for if hee pay debts vpon simple contracts before an Obligation, he shall be compelled to pay the debt vpon the obligation of his owne goods, if there bee no goods sufficient of him that died intestat, and though it be suffred in such case that the Ordinary may pay pound and pound like, that is, to apportion the goodes among the debtors after his discretion, yet by the rigor of the common Law, hee might be charged to him that can first haue his iudgement against him. And furthermore by that is said afore in the last Chapter it appeareth that if a Bishop that hath goods of his patrimony, or a master of a Colledge, or a Deane of goods, that they haue of their owne onely to themselues dye intestate, that the Ordinarie shall commit administration thereof, as before appeareth, and if they make Executors, then the executors shall haue the ministration thereof: But the heires nor the kinsmen by that reason onely that they be heires or of kin to him that is deceased, shall haue no medling with his goods, except it be by custome of some countries where the heires shall haue their sons, or where the children (the debts & legacies paied) shall haue a reasonable part of the goods after the custome of the countrie.

¶ If a man be outlawed of felonie, or be attainted for murder or felonie, or that is an Asciſmus, may be ſlaine by euery ſtranger.

Cap. 41.

IT appeareth in this said sum called Summa Angelica in the 21. Ch. in the title of Asciſmus the 2. Paragrafe, that hee is an Asciſmus that will ſlay men for money at the inſtance of euerie man that will moue him to it, and ſuch a man may lawfully be ſlaine, not onely by the Iudge, but by euerie priuate perſon. But it is ſaid there in the 4. paragrafe, that hee muſt firſt be iudged by the law as an Asciſmus ere he may be ſlaine, or his goods ſeiſed. And it is ſaid further there in the 2. paragrafe, that alſo in conſcience ſuch an Asciſmus may bee ſlaine if it bee done through a zeale of iuſtice, and elſe not. Is not the law of the realme likewiſe of men outlawed, abiured, or iudged for felony?

St. In the law of the realme there is no ſuch Law, that a man ſhall bee iudged as an Asciſmus, ne if a man be in full purpoſe for a certain ſumme of money that he hath receiued, to ſlay a man, yet it is no felonie, ne murder in the law till he hath done the act: for intent of felony nor murder is not puniſhable by the common Law of the Realme, though it bee deadly ſinne before God, but in Treaſon or in ſome other particular caſes by ſtatute that intent may bee puniſhed. And though a man in ſuch a caſe kill a man for money: yet it ſhall not bee admitted that

hee is an Aſciſmus For as it is ſayd before, there is no ſuch terme of Aſciſmus in the law of the Realme, but he ſhall in ſuch caſe be arrained vpon the murder. And if he confeſſe it or pleade that he is not guiltie, & is found guilty by xij. men, hee ſhall haue iudgement of life, and of member, and ſhall forfeit his lands and goods. And like Law is of an Appeale brought of the murder, if hee ſtand dumbe and will not anſwere to the murder, hee ſhall bee attainted of the murder, and ſhall forfeit life, lands & goods: But if he be arraigned of the murder vpon an Indictment at the Kings ſuit, and thereupon ſtandeth dumbe and will not anſwere, there he ſhall not be attainted of the murder, but he ſhall haue paine fort and dure, that is to ſay, hee ſhall be preſſed to death, and he ſhal there forfeit his goods, and not his lands. But in none of theſe caſes (that is to ſay) though a man bee Outlawed for murder or felony, or bee abiured, or that hee bee otherwiſe attainted: yet it is not lawfull for any man to murther him, or ſlay him, ne to put him in execution but by authoritie of the Kings Lawes. Inſomuch that if a man bee adiudged to haue paine fort and dure, and the Officer beheadeth him, or on the contrariwiſe putteth him to payne fort and dure, where hee ſhould behead him, hee offendeth the law And if an Officer which hath authority to put a man to death, may not put him to death but according to the iudgement, then meethinketh it ſhould follow that more ſtronger a ſtraunger may not put ſuch a man to death of his owne authoritie without commaundement

of

of the Law. But if the iudgement bee that hee shal be hanged in chaines, & the officer hangeth him in other things and not in chaines, I suppose he is not guiltie of his death: But some say he shall there make a fine to ỹ king, because hee hath not followed the wordes of the iudgement.

Also if a man that is no officer would arrest a man that is outlawed, abiured, or attainted of murder or felony, as is aforesaid, & he disobeyeth the arrest, & by reason of the disobedience he is slaine, I suppose the other shal not be impeached for his death: for it is lawfull vnto euerie man to take such persons & to bring thē forth that they may bee ordred according to the law. But if a Capias be directed vnto the Sheritte to take a man in an action of debt or trespasse, there no man may take the man, but hee haue authoritie from the Sheritte: and if any man attēpt of his owne authoritie to take him, & he resisteth, & in the resisting is slaine, he that would haue taken him is guilty of his death.

¶ Whether a man shall bee bounden by the act or offence of his seruant or officer.

Cap. 42.

IN the said summe called Summa Angelica, in the title Dominus iiij. Paragrafe, is asked this question, whether a man shalbe charged for his household: and it is said that there he shal when the household offendeth in an office or ministerie

nistry that the Maker is the chiefe officer of, and he hath the worke and the profit of the household: For it shall be his default that he would chuse such seruants, for hee ought to appoint honest persons: But it is said there, that it is to be vnderstood ciuilly, & not criminally, whereby, as is sayd there, he that is a gouernour is bound for the offence of his officers, & that the same is to be holden of a Captaine, that he shall be bound for the offence of his squires, and an host for his guest, and such other. Neuertheles it is said there, that certaine Doctors, there rehearsed, said thereto, that if the office be an open or publike office, as an office of power, or other like, It sufficeth to bring forth him that offended: But it is otherwise if it be not a publike office, but an host or a Tauerner, or other like. But if the household offend not in the office the Lord is not bound as to the Law, but in conscience he is bound if hee were in default by not correcting them, for hee is bound to correct them both by word and example, and if hee find any incorrigible, hee is bound to put him away, except that he haue presumptions, that if hee doe so, he will be the worse, and then hee may doe that he thinketh best, as he is excused, and else not: For to such persõs it is said, Error qui non resistitur, approbatur: (that is to say) an Error that is not resisted, is approued. And though diuers of the sayings before rehearsed agree with the Law of the Realme, yet all doe not so, and also they that do are to bee obserued by authoritie of the law of the realme, & not by the authoritie alledged in the said Paragrafe.

And

And therfore I intend to treat somwhat where the Master shall be charged by his seruant, or deputie, or by them that be vnder him in any office, & where not, and then I intend to touch some other things, where the Master after the Lawes of the Realme shall be charged by the act of his seruant in other cases not concerning offices, and where not.

First, if a man be committed to ward vpon arrerages of accompt, & the keeper of the prison suffereth him to goe at large, then an action of debt shall lye against him And if hee be not sufficient, then it lyeth against him that committed the keeping of the prison vnto him, and that is by reason of the Statute of West. the 2. ca. 11. Also if Bailifes of Franchises that haue Returne of Writs make a false returne, the partie shall haue auerrement against it, aswell of too little issues as of other things, aswell as he shall haue against the Sherife, but all the punishment shall be onely vpon the bailife, & not vpon the Lord of the Franchise, and that doth appeare by the Statute made in the first peare of King Ed. 3. the 1. chapter. But if an vndersherife make a returne whereupon the Sherife shall be amerced, there the high Sherife shall bee amerced, for the returne is made expressly in his name But if it be a false returne whereupon an action of disceit lyeth, in that case it may bee brought against the vndersherife. And see therof the Statute that is called Statutum de male returnantibus breuia.

Also if the kings Butler make deputies, hee shall answere for his deputies as for himselfe,

as

as appeareth in the statute made in the 21. yere of King Edward the 3. De proditionibus the 21. Chapter.

Also, in ꝑ statute that is called Statutū Scaccarij it is enacted among other things, that no officer of the Exchequer shall put any clerk vnder him, but such as he will aunswere for. And forasmuch as the statute is generall, it seemeth that he shall aunswere as wel for an vntruth in any such clerke as for an ouersight.

Also in the 14. yere of King E. the 3. ca 9. it is enacted, that all Gailes shall be appointed again to the Shires, and that the Sherife shall haue the keeping of them, and that the Sherife shall make such vndergardeins for the which they will aunswere. And neuertheles I suppose that if there be an escape by default of the gailer, that the king may charge the Gailer if hee will. But it is no doubt but hee may charge the Sherife by reason of this statut if he will. But if it bee a wilfull escape in the Gailer which is felonie in him, the Sherife shal not be bound to aunswere to the felonie, ne none other but the Gailer himselfe, and they that assented to him.

Also if a man haue a Sherifwicke, Constableship, or Bayliwicke in fee, whereby he hath the keeping of prisoners, if he let any to replevin that bee not replevinshable, and thereof bee attaint, hee shall leese the office &c. And if it bee an Undersherife, Constable, or Baylife, that hath the keeping of the prison, that doth it without knowledge of the Lord, hee shall haue imprisonment by three yeares, and after shall be raunsomed at the Kings will, as appeareth

in the statute of West. the 1. the 15 chap. And so it appeareth, that in this case, hee that is the Lord of the prison, is not bound to answere for the offence of them that haue the rule of the prison vnder him, but that they shall haue the punishment themselues for their misdemeanor. Also there is a statute made in the 27. yeare of king Ed. 3. the 19. Chap. that is called the statute of the Staple, wherby it is ordained, that no Merchant, ne none other man shall not leese their goods for the Trespas, or forfeit of their seruants vnlesse it be by commandement of his Master, or that hee offend in the office that his Master hath put him in, or else, that the Master shal be bound to answere for the deed of his seruant by the law merchant, as in some place it is shed.

Also, it is enacted in the 14. yeare of King Edward the 3. the 8. Chapter, that Wapentakes and Handreds that be seuered from the Counties, shall bee adioined againe vnto them, and that if the Sheriffe hold them in his owne hands, that hee shall put in them such Bailifes that haue lands sufficient, and those for which hee will answere, and that if hee let them to ferme, that they bee let to the auncient ferme: but after it is prohibited by the Statute of the 22. yeare of king Henry the 6. the 10. Chapter, That no Sheriffe shall let his Bailiwicks, nor Wapentakes to ferme. And when they be once in the Sheriffes owne hands, and the Sheriffe put in Bailifes, they bee but as Vnderbailifes to the king, and the Sheriffe the high bailife, and they in maner the Sheriffes seruants and put in

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only by him: And therefore by the said stat. of King Ed the 2. hee shall aunswere for them, if they offend in their office, but if the Sheriffe let the to ferme, then though the sheriffe offend the statute in that doing, yet whether hee shall bee charged for their misdemeanor in the office or not, is a great doubt in some men, for they say that this statute is onely to be vnderstood where the bailiwickes be in the sheriffes hands, but here they bee not so, ne the bailifes bee not his seruants, but his fermours: And therefore they say, that if the Sheriffe shalbe charged for them, it is by the common Law, and not by the statute aforesaid. Also in the 2. peare of King Henrie the 6. the 14. Chap. it is enacted, that Officers by patent in euery court of the King, that by vertue of their Office haue power to make clerkes in the said courts, shalbe charged & sworne to make such clerkes vnder them, for whom they will aunswere. Also the Hospitelers & Templers be prohibit they shall hold no plee that belongs to the Kings Courts, vpon pain to yeld damages to the party grieued, & to make ransome to the king: that the superious shal answere for their obediencers, as for their owne deed. West. 2. cap. 42. Also the Serieant of the Catery shall satisfie all the debt, damages, and executions that shall bee recouered against any that is purueior, or achator, vnder him that offend against the Statute of xxxbj. of Edw. the iij. or against the statute of xxiij. of Henrie the vj. in case the purueiour, or achatour bee not sufficient &c. And the partie plaintife shall haue a Scire facias against ꝑ said ser-

sergeant in this case to haue execution, as appeareth in the 24. yeare of King Henry the vj. the 1. chapter.

Also if a man bee sent to prison vpon a Statute merchant by the Maior, before whom the recognisance was taken, & the Gaoler will not receiue him, he shall answere for the debt if hee haue wherewith, & if not, then he shall answere that committed the Gaole to him, as appeareth in the statute called the statute merchant.

And if Outragious tolle bee taken in the towne Merchant, if it be the Kings towne let to farme, the king shal take the franchise of the Market into his hands: And if it be done by the Lord of the Towne, the King shall doe in likewise: And if it be done by the Bailike, vnknowing to the Lord, hee shall yeeld againe as much as hee hath taken, and shall haue imprisonment of 40 dayes: And so it appeareth that the Lord in this case shall not aunswere for his Bailike, West. the 1. cap. 30. And in all the cases before rehearsed, where the superiour is charged by the default of him that is vnder him, hee in whose default his superiour is so charged, is bound in conscience to restore him that is so charged through his default: except the case before rehearsed of the Hospitelers, for all that the obediencer hath, is the superiors if he will take it. And therefore what recompence shalbe made by the obediencer in that case, is al at the will of the superiour. And now I intend to shew thee some particular cases, where the master after the lawes of ꝑ realme shall be charged by the act of his seruant, bailif, or deputy, & where

where not, and so for to make an end of this Chapter.

First, for trespasse of batterie, or wrongfull entrie into lands or tenements, ne yet for Felony or murder, the master shall not be charged for his seruant, vnlesse hee did it by his commandement.

Also if a seruant borrow money in his masters name, the Master shall not bee charged with it, vnlesse it come to his vse, & that by his assent. And the same law is if the seruant make a contract in his masters name, the contract shall not bind his master, vnlesse it were by his masters commandement, or that it came to the masters vse by his assent. But if a man send his seruant to a faire or market, to buy for him certaine things, though hee commaund him not to buy them of no man in certaine, and the seruãt doth accordingly, the master shall be charged, but if the seruant in that case buy them in his owne name, not speaking of his Master, the Master shall not be charged, vnles the things bought come to his vse.

Also if a man send his seruant to the market with a thing which he knoweth to bee defective to be sold to a certaine man, and hee selleth it to him, there an action lyeth against the Master: but if the Master biddeth him not sell it to any person in certaine, but generally to whom hee can, and hee selleth it accordingly, there lyeth no action of deceit against the master.

Also if the seruant keepe the masters fire negligently whereby his masters house is brẽt and his neighbours also, there an action lyeth

against the Master. But if the seruaunt beare fire negligently in the street, and thereby the house of another is burned, there lyeth no action against the Master.

Also, if a man desire to lodge with one, that is no common Hosteler, and one that is seruant to him that he lodgeth with, robbeth his chamber, his master shall not be charged for that robbing: but if he had been a common Hosteler he should haue been charged.

Also, if a man be gardein of a prison, wherein is a man that is condemned in a certaine summe of money, and another that is in prison for Felonie, and a seruaunt of the gardeine that hath the rule of the prison vnder him, wilfully letteth them both escape: in this case the gardeine shall answere for the debt, and shall pay a fine for the escape of the other, as for a negligent escape, and the seruaunt onely shall be put to answere to the felony, for the wilfull escape.

Also, if a man make another his generall receiuour, and that receiuour receiueth mony of a creditour of his Master, and maketh him acquitance, and after payeth not his Master, yet that payment dischargeth the creditour: but if the creditour had taken an acquitance of him without paying him his money, that acquitance onely were no barre to the Master, vnlesse hee made him receiuer by writing, and gaue him authoritie to make acquitances, and then the authoritie must bee shewed. And if the creditour in such case by agreement betweene the receiuour and him, deliuered to the

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receiuer a horse or another thing in recōpence of the debt, that deliuerie dischargeth not the creditour, vnlesse it be deliuered ouer vnto the Master, and hee agree to it. For the receiuer hath no such power to make no such commutation, but his master giue him speciall commandement thereto.

Also, if a seruant shew a Creditour of his master, that his master sent him for his money, and hee payeth it vnto him, that payment dischargeth him not, if the master did not sent him for it indeed, except that it came after vnto the vse of the master by his assent.

Also, if a man make a bailife of a manor, and after the Lord of whom the Manor is holden grant the seigniorie to another, and the bailife after payeth the rent to the graūtee, that payment of the rent counteruaileth no attournement though it were by fine, ne shall not bind his Master, till hee attorne himselfe: but if the Lord of whom the land is holden disseised one of the seigniorie, and the bailife payeth the rent to the heire of the Lord, that is a good seisin to the heire, though the bailife had no commandement of his Master to pay it: for it belongeth to his office to pay rents seruice, but not rent charge as some men say.

Also, an encrochment by the bailife shall not bind the master in auowrie, if he had no cōmandement of the master to pay it. Also if there bee Lord, meine, and tenant, & the tenaunt holdeth of the meine as of his manor of D. the meine maketh a bailife, and after the tenant maketh a feffement, the feffee tendeth notice to the bailife,

and hee accepteth his rent with the arrerages, this notice shall not bind the Lord, ne compell him to alter his auowrie: for the office of a bailife stretcheth not thereto, but hee must haue therein a speciall commaundement of his Master. Also if a seruant ride on his masters horse to doe an errant for his Master into a towne that hath authoritie to make attachments of goods vpon plaints of debt &c. and there vpō a plaint of debt made against the seruant, the Masters horse is attached by the Officers, thinking that the horse were his owne, and because the seruant appeareth not, ꝑ officers seise the horse as forfait: in this case the Lord shall haue an action of trespas against the officers, & this attachmēt for the debt of his seruant, shall not bind him &c. But that an hoast or keeper of a Tauerne shalbe charged for their guests, vnlesse it bee done by their assent or cōmandemēt, I do not remember that I haue read it in the lawes of England.

¶ Whether a villaine, or a bondman may giue away his goods

Cap. 43.

IT appeareth in the said sum, called Summa Angelica, in ꝑ title Donatio prima the 9. Paragrafe, that a bondman, or a religious man, a Monke, ne such other that hath nothing in proper, may not giue, but it bee by licence of their superiour: but that saying is not, as it is said

sayd there, to be vnderstood of Religious persons that haue lawfull ministration of goods, for they giue with a cause reasonable, it is good, but without cause they may not.

Also if they by the licence of the prelat with the counsell of the more part of the Couent abide at schoole or goe on pilgrimage, they may giue as other honest scholers and pilgrimes be reasonably wont to doe: and they may also giue almes where there is great need, if they haue no time to aske licence.

Also if they see one in extreame necessity, they may giue almes though their superiors prohibite them, for then all things bee in common by the law of God. And therfore they be bound for to doe it, as appeareth in the forsaid sum called Summa Angelica in the title Eleemosina, the 6. Paragrafe. Doth not the Law of England agree with these diuersities? Stu. Forasmuch as the question is onely made whether a Villaine or a bondman may giue away his goods or not: and it seemeth that after the aforesayd sum, in the tiytle which thou hast before rehearsed, that he ne none other that hath no property may not giue, whereby it appeareth that the said summe taketh it, that a bondman should haue no property in his goods, and that therefore his gift should bee void, I shall somewhat touch what property and what authority a Villeine hath in his goods after the Law of the Realme, and what authority the Lord hath ouer them. And I will leaue the diuersities that thou hast remembred before of Religious persons to them that list to treat

further therein hereafter.

First if a Villeine haue goods either by his owne proper buying and selling, or otherwise by the gift of other men, hee hath as perfit a propertie, and also as whole interest in them, and may as lawfully giue them away as any free man may. But if the Lord seise them before his gift, then they bee the Lords, and the interest of the villeine therein is determined.

Also if the Lord seise part of the goods of his Villeine in the name of all the goods that the Villeine hath or shall hereafter haue, that seisure is good, for all the goods that hee had at the time of the seisure. But if goods come to the Villeine after the seisure, he may lawfully giue them away notwithstanding the sayde seisure.

Also if the Lord claime all the goods of the villeine, and seiseth no part of them, that seisure is voyd, and the gift of the villeine is good notwithstanding that seisure.

Also if a man bee bound to a Villeine in an obligation in a certaine sum of money, and the Lord seiseth the obligation, then the obligation is his, but yet he can take no action thereupon but in the name of the villeine: and therefore if the villeine release the debt, the Lord is barred by that release.

Also if a woman bee niese, and shee marieth a free man, the goods immediatly by the mariage be the husbands, and the Lord shall come too late to make any seisure: and if the husband in that case maketh his wife his Executrix and

and dyeth, and the wife taketh the same goods againe as executrix to her husband, yet it shall not bee lawfull for the Lord to take them from her, though she be a niele as she was before the marriage.

Also if goods be giuen to a man to the vse of a Villeine, and the Lord seiseth those goods, the seisure after some men is good by the Statute made in the 19. yere of K. H. 7. wherby it is enacted, ỹ the Lord shall enter into lands whereof other persons be seised to ỹ vse of his villein: and they say that the same statute shall bee vnderstood by equitie of goods in vse, aswell as of Lands in vse.

Also if a Villein be made a priest, yet nevertheleſſe the Lord may seise his goods and lands as he might before: vntill the seisure he may alien them and giue them away as hee might before he was priest. And in this case ỹ Lord may order him, so that he shall doe him such seruice as belongeth to a Priest to doe, before any other: but hee may not put him to no labor nor other businesse, but that is honest and lawfull for a Priest to do.

Also if a Villeine enter into Religion in his yeare of proofe, he may dispose his goods as hee might haue done before he toke the habit vpon him.

And in likewise the lord may seise his goods as hee might haue done before, but if he after make executors, and bee professed, and the executors take the goods to the performance of the will, then the Lord may not seise the goods though the executors haue them to the perfor-

mance of the will of him that is his villein, nor in that case the Lord may not seise his body, ne put him to no maner of labour, but must suffer him to abide in his religion under the obedience of his superior as other religious persons doe, that bee not bounden: And the Lord hath no remedie in that case for losse of his bondman, but onely to take an action of Trespas against him that receiued him into Religion without his licence, thereupon to recouer dammages, as shall be assessed by xij. men. Many other cases there be concerning the gift of the goods of a villeine, whereof I shall speake no more at this time, for this that I haue said sufficeth to shew that the knowledge of the Kings law is right expedient to the good order of conscience concerning such goods.

¶ If a Clerke bee promoted to the tytle of his patrimony, and after selleth his patrimony and after falleth to pouertie, whether shall he haue his tytle therein or not.

Cap. 44.

IN the said summe called Rosella, in the title Clericus quartus, the 24. article it is asked, if a Clerke be promoted to the tytle of his patrimonie, whether hee may alien it at his pleasure, & whether in that alienation the solemnitie needeth to be kept, that is to be kept in alie-

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nations of things of the church: and it is answered there, that it may not bee alienedno more than the goods of a Spirituall benefice, if it be accepted for a title, and expressely assigned vnto him, so that it should goe as into a thing of the church, except hee haue after another benefice whereof he may liue. But if it be secretly assigned to his Title, some agree it may bee alienedand in this case by the Lawes of the Realme, it may be lawfully alienedwhether it be secretly or openly assigned to the Title, for the Ordinarie ne yet the party himselfe after the old custome of the Realme, haue no authoritie to bind any inheritance by authoritie of the Spirituall law: and therefore the land after it is assigned and accepted to be his title, standeth in the selfe same case to bee bought, sold, charged, or put in execution, as it did before. And therefore it is somewhat to be marueyled that Ordinaries will admit such Land for a title, to the intent that hee that is promoted should not fall into extreame pouertie, or go openly a begging, without knowing how the cõmon law will serue therin: for of meere right all inheritances within this realme ought to be ordered by the kings lawes, and inheritance cannot bee bound in this Realme but by fine, or some other matter of record, or by feoffemẽt or such other, or at least by a bargaine that chãgeth an vse. And ouer that to assigne a state for terme of life to him that hath a fee simple before, is void in the Lawes of England without it be by such a matter that it worke by way of conclusion or estopell, and in this case is no

such

such matter of conclusion: and therfore all that is done in such case in assigning of the said title is void. Also there is no interest that a man hath in any manor, Landes or Tenements for term of life, for term of yeres, or otherwise, but that he by the law of the realme may put away his right therein if he wil. And then when this man alieneth his Land generally, it were against the law of the Realme that any interest of such a Title should remaine in him against his owne sale: & there is no diuersity, whether the assignement of the Title were open or secret, and so the Title is void to all intents. And in likewise if a house of Religion, or any other spirituall man that hath granted a Title after the custome vsed in such titles, sell all the lands and goods that they haue, that sale in the lawes of England is good as against the title, and the buyer shall neuer be put to answere to the title. Also some say, that vpon the common titles that be made daily in such case, that if hee fall to pouerty that hath the title, he is without remedy: for they be so made that at the commō Law there is no remedy for them, and if hee take a suit in the Spirituall court, many men say that a Prohibition or a Præmunire lyeth. And therefore it were good for Ordinaries in such case to counsell with them that bee learned in the Law of the Realme to haue such a forme deuised for making of such titles, that if need bee, would serue them that they bee made vnto, or else let them be promoted without any title, and to trust in God, that if they serue him as they ought to doe, he will prouide for them

to

to haue sufficient for them to liue vpon. And beside these cases that I haue remembred before, there bee many other cases put it the sayd sums for the well ordering of conscience, that as me thinketh are not to bee obserued in this Realme, neither in Law nor conscience.

Do. Doest thou then thinke that there was default in them that drew the said summes, and put therein such cases and such solutions that as thou thinkest hurt conscience, rather than to giue any light to it, specially as in this Realme?

St. I thinke no default in them, but I thinke that they were right well and charitably occupied, to take so great paine and labor as they did therein, for the wealth of the people and cleering of their conscience: for they haue thereby giuen a right great light in conscience to all Countries where the law Ciuill and the Law Cannon bee vsed to temporall things. But as for the Lawes of this realme they knew them not, ne they were not bound to know them, and if they had known them, it would little haue holpen them for the countries that they most specially made their treatises for: And in this countrie also they be right necessarie and much profitable to all men, for such doubts as rise in conscience in diuers other maners not concerning the law of the realme. And I maruell greatly that none of them that in this Realme are most bounden to doe that in them is to keepe the people in a right iudgement, and in a clearenesse of conscience, haue done no more in time passed to haue the Law of the Realme knowne than they haue done,

for

for though ignorance may sometimes excuse, yet the knowledge of the truth, and the true iudgement is much better, & sometime though ignorance excuseth in part, it excuseth not in all: and therefore me thinketh they did very will if they would yet bee called on to haue that point reformed as shortly as they could. And now because thou hast well satisfied my mind in many of these questions that I haue made, I purpose for this time to make an end. Do. I pray thee yet shew me or that thou make an end moe of these cases, that after thine opinion bee set in diuers bookes of learning of conscience, that as thou thinkest for lacke of knowledge of the Law of the Realme, doe rather blind conscience, than giue a light vnto it: for if it be so, then surely, as thou hast said it would be reformed, for I thinke verily the Lawes of the Realme in many cases must in this Realme bee obserued as well in conscience, as in the iudiciall Courts of the Realme. S. I will with good will shew to thee shortly some other questions, that bee made in the said sum, to giue thee another occasion, to see therein the opinions of the said summes, and to see farther therupon how the opinions and the Lawes of the Realme do agree together. And yet beside these questions that I intend to shew vnto thee, there bee many other questions of the sayd sums, that had as great need to bee more plainely declared according to the Lawes of the Realme, as those that I shall shew thee hereafter, or as I haue spoken of before: but to the cases that I shall speake of hereafter I will shew thee no thing

thing of my conceipt in them, but will leaue it to other that will of charitie take some further paine hereafter in that behalfe.

¶ Diuers questions taken out of the Student of the summes, called Summa Rosella, and Summa Angelica, which hee thinketh necessarie to be looked vpon, and to bee seene how they stand and agree with the law of the Realme.

Cap. 45

THe first question is this, whether a Custome may breake a law positiue. Summa Rosella, titulo Consuetudo para 13.

The second is, if a man attainted or banished be restored by the Prince, whether shall that restitution stretch to the goods, Summa Rosella in the title, Damnatus in principio.

Item, if a man be outlawed of felonie, abiured, or attainted of murther or felonie, or he that is an Asciſmus may be slain by strangers: and see like matter thereto, Summa Angel. in the title Asciſmus para. 11.

This question is somewhat answered to, in a new addition, as appeareth before in the 14. Chapter.

Item, whether the maister shall bee bound by the act, or offence of his seruant, or officer, Summa An-

Angel. in the title Dominus para. 4.

This question is answered to in an addition, as appeareth before the xlij. Chapter.

Item, whether a Villeine may giue away his goods. Summa Angelica, in the title Donatio prima, para. 9.

This question is answered to in an addition as appeareth before in the 43. Chap.

Item, whether an Abbot may giue &c. Sūma Angelica in the title Donatio 1. para. 10. & 30.

Item, whether a woman couert may giue away any goods. And it is answered. Summa Angelica, in the title Donatio 1. Parag. 11. that shee may not, without shee haue goods beside her dowrie, but onely in almes.

Item, if a man do treason, whether his gift of goods after, before attainder, be good. Summa Angelica, in the title donatio 1. para. 12. & it seemeth there may, and looke Summa Angelica, in the title Alienatio, para. 24.

Item, if a man wittingly make a contract betweene two kinsfolke, or other that may not lawfully marrie together, whether he hath forfeit his goods. Summa Ang. in the title donatio 1. para. 14.

Item, whether the Father may giue to the son. summa angel. in the title donatio prima par. 19. and Summa Rosella, in the title donatio 2. para. 42.

Item, whether a man may giue aboue ℔. ß. absque inquisitione. summa ang. in the title donatio 1. para. 20.

Item, whether a gift shal be auoided by an in-

ingratitude, Summa Rosella, in the title Donatio 1. parag. 17. & 29. and there it is said, ꝯ the gift is void by the law of nature, & looke Summa Angelica, in the title Donatio prima, Paragrafe 42. & 45.

Item, where any gift betweene the husband and the wife may bee good, and it is said yea, when the husband giueth it, Causa remunerationis, Summa Rosella, in the title Donatio 1. para. 32.

Item if a man make a will, & enter into religion, whether he may after reuoke the will, and it is said, that Friers Minors may not, and other may. Summa Rosella, in the title donatio 1. para. 35. in fine.

Item, if a man giue another a town with all the rights that he hath in the same, whether the patronage &c. and the tithes passe. Summa Rosella, in the title Ecclesia 1. para. 56.

Item, whether all that is bought with the money of the Church be the churches. Summa Rosella in the title Ecclesia 1. para. 7.

Item, if a gift made to Monastery, may bee auoided by that the giuer hath children after the gift. Summa Rosella, in the title Donatio 1. para. 43.

Item, if a man buy a thing vnder the halfe price, whether he bee bound by the Law to restore &c. Summa Rosella, in the title Emptio & venditio, para. 6.

Item, whether a cõmon theefe, vel cõmunis depopulator agrorum may abiure, Summa Rosella, in the title Emunitas 2. in principio. Et habetur

betur ibi in fine, qđ licet leges excipiant plurieſ perſonas tum per ius canonicum legibus dero. gatum eſt.

Item, whether a man ſhall take the Church for great enormitious offences that is not murther, nor felonie. Summa Roſella in the title Emunitas 2. Parag. 3. 11.

Item, if a man take one in the high way, and draw him out, & there beateth him, whether hee ſhall haue ỹ puniſhmẽt that is ordained for thẽ that ſtrike one in the high way. Summa Roſella in the title Emunitas. 2. Para. 6.

Item, whether hee that taketh the Church may after the offence by iudged to death. Summa Roſella, in the title Emunitas 2. para. 8.

Itẽ, whether the Biſhops palace is be ſãctuarie, Súma Roſella, in the title Emunitas para. 24.

Item, whether the dignitie of the biſhop, or Prieſthood „ ſcharge bondage Summa Roſella in the title Epiſcopus, in principio.

Item, whether a clerke is bound to pay any Impoſitions, or Tallages, for his patrimonie or otherwiſe. Summa Roſella in the title Excommunicatio 1. diuiſione oct. para. 4. & 5. & 6. & diuiſione nona, para. 1.

Item, if it were ordained by ſtatute, that if a man ſell &c. he ſhall giue to the king ỹ. ỗ whether a clerke be bound to giue it if he ſell of his prebend. Summa Roſella, in the title Excommunicatio, 1. diuiſione nona, para. 3.

Item, if it bee ordained by ſtatute that there ſhall not bee laid vpon a dead perſon, but ſuch a certaine cloth, or thus many tapers, or can-

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deig, whether the statute be good, & it is left for a question. Summa Rosella, in the title Excommunicatio 1. diuisione 18. para. 3. in fine.

Item, if a man make a lease of a mill for term of yeres, & it is agreed that the lesse shall grind the lesser toll free during the terme, after he lesser is made an earle or a duke, & hath greater houshould than before, whether the lesse be bound there &c. Summa Rosella, in the title Familia pa. 5.

Item, if a master will not pay his seruants wages, that hath serued him faithfully, whether that seruaunt may take secretly as much goods of the masters &c. & if he do, whether hee be bound to restitution. Summa Rosella, in the title Familia para. 6.

Item, things immoueable of the church may not be giuen. Summa Rosella, in the title Feodū parag. 1. And see there in principio what Feodum is.

Item, whether the sons bastards, & the sons lawfully begotten shall inherite together, Summa Rosella, in the title Filius para. 1.

Item, whether father and mother may succeed to their bastards. Summa Rosella in the title Filius, para 4.

Item, whether the father may leaue any of his goods to his bastards, Summa Rosella in the title Filius, para. 5. And Summa Rosella, in the title Societas, para. 13.

Item, whether the offence of the father shall hurt the son in tempozall things. Summa Rosella, in the title Filius.

Item, if a man giue all his lands and goods to his childrē, whether a bastard shall haue any

part, Summa Rosella, in the title filius para. 22.

Item, to whom treasure found belongeth, Summa Rosella, in the title furtum para. 11.

Item, if a deere, or other wild beast that is so sore hurt þ he may be taken, commeth into another mans ground, whether it be his that oweth the ground, or his that strake him, Summa Rosella, in the title furtum, para. 13.

Item, whether theft be in a little thing aswell as in a great thing. Summa Rosella in the title furtum, para. 18.

Item, what pain a thefe shall haue. Summa Rosella, in the title furtum, para. 22.

Item, that if goods of dead men goe to the heires, & that of damned men, &c. De terris Summa Rosella, in the title Hæreditas, para. 1.

Item, whether a man shall bee said guilty of murder by commandement, counsell, or assent, Summa Rosella, in the title Homicidiũ 2. per totum, & like matter in Homicidiũ 4 in principio, and in diuers other cases.

Item, a man maketh a priuie contract with a womã, & after hath a child by her, & after marieth another woman, and hath a child, she not knowing the first contract, which of the children shalbe his heire. Summa Rosella, in the title Illegitimus para. 4

Item, whether the Pope may legitimate one to temporall things, & to succeed, Summa Rosella, in the title Illegitimus para.

Item, if goods be found that were left of the owner as forsaken, who hath right to them. Summa Rosella in the title Inuenta para. 2. And looke Súma Rosella in the title furtum, para. 17.

And

And thus I make an end of these questions: & because thou desirest me in the 31. Chapter, to shew thee somewhat, where ignorance excuseth in the Law of the realme, & where not, I will answere somewhat to thy question, and so commit thee to God.

¶ Where ignorance of the Law excuseth in the laws of England, and where not.

Cap. 46.

IGnorance in the law (though it be invincible) doth not excuse as to ꝑ law but in few cases: for every man is bound at his perill to take knowledge what ꝑ law of the realm is, as well ꝑ law made by statute as the cõmon law, but ignorãce of the deed, which may be called the ignorance of the truth of the deed, may excuse in many cases. D. I put case that a statute penall be made, & it is enacted that the statute shall bee proclaimed by such a day in every shire, & it is not proclaimed before the day, & after the day a man offends against the statute, shall hee runne in the penalties? I think yea, if there be no farther words in the statute to help him, that is to say, that if the proclamation bee not made, ꝑ no man shalbe bound by the stat. & the cause is this there is no statute made in this realme, but by the assent of the lords spirituall & tẽporal, and of all the cõmons, that is to say, by the knights of the shire, citizens, and burgesses that be chosen by assent of the commons, which in the parliament represent the estate of the whole cõmõs:

And euery statute there made, is of as strong effect in the Law, as if all the commons were there present personally at the making thereof: and like as there needed no proclamation, if all were there present in their owne person, so the law presumeth there needeth no proclamation, when it is made by their authorities, the when it is enacted, that it shall be proclaimed &c. that is but of the fauours of the makers of the statute, & not of necessitie: and it cannot therfore be taken, that their intent was that it should bee voide if it were not proclaimed. Neuertheless some be of opinion, that if a man before the day appointed for the proclamation offend the statute, that he should not in that case be punished, for they say, that the intent of the makers of ꝑ statute shall be taken to be, that none should bee punished before the day, which is a doubt to some other: But admit it be as they say, that he shall be excused, yet hee is not excused by the ignorance of the Law, but because the intent of the makers excuseth him. D. It is enacted in ꝑ 7. yeare of R. 2. cap. 6. that euerie Sherife shall proclaime the statute of Winchester three times euery yeare, in euery market towne, to thintent the offendors shall not be excused by ignorance, & it seemeth by those words, that if no Proclamation be made, that the offendor may be excused by ignorance. Stu. Some take the intent of that statute to be, that the people by that Proclamation should haue knowledge of the Statute of Winchester, to the intent, that the forfeiture therein may bee taken as well in conscience as in law. and some take the statute to bee

of

of such effect as thou speakest of, that is to say that no forfeiture should grow vpon the statute of Winchester against them ỹ were ignorant, but proclamation were made according to the said statute of Richard. And if it be so take, the statute of Winchester is of small effect against most part of the people, for certain it is that the said proclamation is not made: but admit it bee as they say, then they that be ignorant bee excused by ỹ said particuler statute, specially made in that case, and not by the generall rules of the law: and sometime in diuers statutes Penalty, they that bee ignorant bee excused by the selfe statute, as it is vpon the statute of Richard the 2. the 13 yeare, the 2. statute, and the last Chap. where it is enacted, that if any person take a benefice by prouision that he shalbe banished the realme & forfeit all his goods, and that if he bee in the Realme, he auoid within 6. weekes after he hath accepted it, and that none shall receiue him ỹ is so banished after the said 6. weekes vpon like forfeiture if he haue knowledge: and so hee that hath no knowledge is excused by ỹ expresse words of the statute. And in likewise he that offendeth against Mag. Cha. is not excommenged but hee haue knowledge that it is prohibit that hee doth. For they bee onely excommenged by the sentence called Sẽtencia lata sup. cartas, that doe it willingly, or that doe it by ignorance, & correct not themselues within 15. dayes after they haue warning. And sometime they that be ignorant of a Statute bee excused from the penaltie of the statut, because it shalbe taken that the intent of the makers of the sta-

tute was, that none should bee bound but they that haue knowledge: but that any man shalbe discharged in the law by ignorance of the law only for that he is ignorant, I know few cases except it might be applied to infants that be in their infancie, & within yeres of discretiō: for if ignorance of the law should excuse in the law, many offendors would pretend ignorance. Do. Shall an infant that hath discretion, & knoweth good frō euill, be punished by a penall statute that he is ignorant in? If the statute be, that for the offence hee should haue corporall payne, I thinke he shall be excused and haue no corporall payne: but I suppose that that is not for the ignorance, for though hee knew the statute, & willingly offended, yet I thinke he shall haue no corporall paine: As where hee plead Ioint-tenancie by deed that is found against him, or if hee plead a Record in Assise, and faileth of it at his day: but that is because the law presumeth that it was not the intent of the makers of the Statute, that he should haue that punishment: but if he be of yeres of discretion to know good from euill, whether hee shall then forfeit the penaltie of a penall statute it is more doubt, for it is commonly holden, that if an infant had not bin excepted in the stat. of forcible entry, that the forcible entry should haue bound him, & so shall his cestuy, & his keeping of a crosse against the statute, or if he be a gardein of a prison and suffer a prisoner escape, he shall pay the debt because the statutes bee generall, & if he should by the statutes be bound within age, like reason will it bee may by a statute penall lese his goods. D.

If

If an Infant doe a murther or felonie at such yeares as he hath discretion to know the law, shall he not haue the punishment of the law as one of full age? I think yes, but that is by an old Maxime of the law for eschewing of murders & felonies, & so it is of a treaspas: but these cases run not vpō the ground of ignorāce, but with what acts Infants shall be punishable or not punishable, for the tenderneſſe of their age, thongh they be not ignorant. Do. We not yet Knights & noblemen that are bound most properly to set their studie to acts of chiualrie, for defence of the realme, & husbandmen that must vse tillage & husbandrie for the sustenāce of the commmaltie, & that may not by reason of their labour put them selues to know the Law, discharged by ignorance of the law? No verily, for sith all were makers of the Statute, the law presumeth that all haue knowledge of that that they make, as it is said before: and as they bee bound at their perill to take knowledge of the Statute that they make, so be all them that come after thē. And as for knights and other nobles of the Realme, me seemeth that they should bee bound to take knowledge of the law aliwell as any other within the realme, except them that giue themselues to the studie & exercise of the law, & except spirituall iudges, which in many cases bee bound to take knowledge of the law of the realm, as is said before in Cap. 25. For though they be bound to acts of Chiualrie, for the defence of the Realme, yet they bee bound also to the acts of Iustice, & that (it seemeth) more thā other be by reason of their great possessiōs and

authoritie: and for the well ordering of the tenants seruants, & neighbors, that many times haue need of their helpe, & also because they bee oft called to be of the Kings councel, & to ꝑ generall counsels of the realm, where their counsell is right expedient & necessary for the cõmon wealth: and therefore if the noblemen of this realme would see their children brought vp in such maner, that they should haue learning and knowledge, more than they haue cõmonly vsed to haue in time past, specially of the grounds & principles of the law of the realme wherin they be inherit (though they had not the high cunning of the whole body of the law, but after such maner as M. Forteſcue in his booke that he entituleth the Booke de laudibus legũ Angliæ, auertiseth the Prince to haue knowledge of the lawes of this realme) I suppose it would bee a great helpe hereafter to the ministration of Iustice of this realme, a great surety for himselfe, and a right great gladnesse to all the people: for certain it is, the more part of the people would more gladly heare ꝑ their rulers & gouernours entended to order them with wisdome and iustice, than with power & great retinues. But ignorance of the deede many times excuseth in the Lawes of England, & I shall shortly touch some cases therof to shew where it shall excuse, and where it shall not excuse, & then the reader may adde to it after his pleasure, & as hee shall thinke to be conuenient.

¶ Certaine cases and grounds where ignorance of the deed excuseth in the laws of England, and where not.

Cap.

Cap. 47.

IF a man buy a horse in open market of him that in right had no propertie to him, not knowing but that he hath right, he hath good title and right to the horse, and the ignorance shall excuse him. But if hee had bought him out of the open Market, or if hee had knowne that the seller had no right, the buying in open market had not excused him. Also if a man retaine another mans seruant not knowing that he is retained with him, the ignorance excuseth him both of the offence that was at the common law against the Maxime that prohibited such retaining of another mans seruant, and also against the Statute 33. Ed. 3. whereby it is prohibit vpon paine of imprisonment, that none shall retaine no seruaunt that departeth within his term, without licence or reasonable cause: for it hath bin alway taken, that the intent of the makers of the said Statute was, that they that were ignorant of the first retayneur, should not run in any penaltie of the statute. And the same Law is of him that retayneth one that is Ward to another, not knowing that he is his Ward. And if homage be due, and the Tenaunt after that the homage is due maketh a Feoffement, and after the Lord not knowing of the Feoffement distraineth for the homage, in that case that ignorance shall excuse him of his damages in a Replevin though he cannot auow for the homage: but if hee had knowne of the feoffement, hee should haue peelded damages for the wrongfull taking. Also if a man be bound in an Obligation that he shall

repaire

repaire the houses of him that hee is bound to by such a certain time, as oft as nede shall require, & after the houses have need to be repayred, but hee that is bound knoweth it not, that ignorance shal not excuse him, for he hath bound himselfe to it, and so hee must take knowledge at his perill: But if the condition had bin that hee should repaire such houses as hee to whom hee was bound should assigne, & after hee assigneth certaine houses to be repaired, but he that is bound hath no knowledge of that assignemēt, that ignorance shall excuse him in the law, for he hath not bound himselfe to no reparation in certaine, but to such as the party will assigne, & if he assigne none, he is bound to none: & therefore sith hee that should make the assignement is prime to the deed, he is bound to give notice of his own assignement: but if the assignement had bin appointed to a straunger, then the obligor must have taken knowledge of the assignement at his perill. Also if a man buy Lands whereunto another hath title which the buyer knoweth not, that ignorance excuseth him not in the law no more than it doth of goods. Also if a seruaunt come with his masters horse to a Towne that by custome may attach goods for debt, & upon a plaint against the seruant, an officer of the towne by information of the partie attacheth the Masters horse, thinking that it were the seruants horse, that ignorance excuseth him not: for when a man will do an act as to enter into Land, seise goods, take a distresse, or such other, hee must by the law at his perill see that that hee doth bee lawfully done, as in this

the cafe before rehearſed. And in likewiſe if a Sheriffe by a Replevin deliver other beaſts, than were diſtrained, though the party that diſtrayned ſhew him they were the ſame beaſts, yet an action of treſpas lyeth againſt him, and ignorance ſhall not excuſe him: for he ſhall bee compelled by the law, as all officers commonly be, to execute the Kings writ at his peril, according to the tenor of it, and to ſee that the act that he doth be lawfully done. But otherwiſe it is after ſome men, if upon a Summons in a Præcipe quod reddat, the Sheriffe by information of the demaundant, ſummoneth the tenant in another mans Lands, thinking it for the tenants land, there they ſay he ſhalbe excuſed: for in that caſe he doth not ſeiſe the Land, ne take poſſeſſion in the land, but only doth ſummon the tenaunt upon the land, & the writ commaundeth him not that he ſhall ſummon the tenaunt upon his owne land, but generally that he ſhall ſummon him, & knoweth not in what Land, & then by an old Maxime in the law it is taken, that he ſhall ſummon him upon the land in demand: and therefore though he miſtake the land and be ignorant of it, yet if the Demaundant informe him that that is the Land that he demaundeth, that ſufficeth to the Sheriffe as to his entry for the ſummoning as they ſay, though it bee not the tenants. And here I make an end of theſe queſtions for this time. Do. I pray thee yet or we depart take a little more paine in my deſire. S. What is that? D. That thou wouldeſt ſhew me thy mind in divers caſes of the Law of the Realm, which (as me ſeemeth) ſtand not ſo clearly with

with conscience as they should doe. And therefore I would gladly heare thy conceit therein, how they may stand with conscience. S. But the cases, & I shall with good will say as I thinke to them.

¶ The first question of the Doctor, how the law of England may be said reasonable, that prohibiteth them that be arraigned vpon an Indictment of felony or murther, to haue counsell.

Cap. 48.

MEe thinketh that the law in that point is verie good and indifferent, taking the law therein as it is. D. Why, what is the law in this point? S. The law is as thou saist, that hee shall haue no counsell: but then the Law is farther, that in all things that pertaine to the order of pleading, the Iudges shall so instruct him and order him, that he shall runne into no ieoperdie by his mispleading: As if he will plede that he neuer knew the man that was slaine, or that he had neuer a peny worth of the goods that is supposed that hee should steale, in these cases the Iudges are bound in conscience to informe him that hee must take the generall issue, and plead that hee is not guiltie: for though they be set to bee indifferent betweene the King and the party as to the party and to the principall matter, as they bee in all other matters, yet they bee in this case to see that the partie take no hurt in forme of pleading in such matters,

ters, as he shal shew to be the truth of the matter, and that is a great fauour of the law: for in appeale, though the Iustices of fauor will most commonly helpe forth the partie, and sometime his Counsell also in the forme of pleading, as they do also many times in common pleas, yet they ought in those cases if they would bid the partie, and his Counsell pleade at their perill. But they may not doe so with conscience vpon indictments as me seameth: for it were a great vnreasonablenesse in the Law, if it should prohibit him that standeth in ieoperdie of his life, that he should haue no counsell, & then to driue him to pleade after the straite rules, and formalities of the law that he knoweth not. Do. But what if hee be knowne for a common offendor, or that the Iudges knowe by examination, or by an euident presumption that hee is guilty, & hee asketh Sanctuarie, or pleadeth misnomer, or hath some Record to pleade, that hee cannot pleade after the forme, May not the Iudges in such cases bid him plead at his perill? St. I suppose they may not, for though hee be a common offendor, or that he be guilty, yet hee ought to haue that the Law giueth him, and that hee shal haue the effect of his pleas, and of his matters entred after the forme of the Law: and also sometime a man by examination, and by witnesse may appeare guiltie that is not: and in likewise there may bee a vehement suspition that he is guiltie, and yet hee is not guiltie, and therefore for such suspition, or vehement presumptions me thinketh a mã may not with conscience bee put from that hee ought to haue

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by the law, ne yet although the Judges knew it of their owne knowledge: but if it were in appeale, I suppose that the Judges might doe therein as they should thinke best to bee done in conscience: for there is no Law that bindeth them to instruct him (but as they doe commonly to the parties of fauor in all other cases) but they may if they will bid them plead at their perill by aduise of their counsell: and if the appellee be poore, and haue no counsell, the court must assigne him counsell if hee aske it, as they must doe in all other places, & that mee thinketh they are bound to doe in conscience, though the appellee were neuer so great an officer, & though the Iudges knew neuer so certainely that hee were guiltie, for the law bindeth them to doe it. And so mee thinketh that there is great diuersitie betweene an indictment & an appeale. And the reason why the Law prohibiteth not counsell in appeale as it doth in an indictment, I suppose is this: There is no appeale brought, but that of common presumption the appellant hath great malice against the appellee: as when the appeale is brought by the wife of the death of her husband, or by the sonne of the death of his father: or that an appeale of robberie is brought for stealing of goods. And therefore if the Iudges should in those cases shew themselues to instruct the appellees, the appellants would grutch & thinke them partiall, and therefore as well for the indemnitie of the court, as of the appellee in case that hee bee not guiltie, the Law suffereth the appellee to haue counsell: but when that a man is indicted at the

Kings

Kings suit, the King intendeth nothing but iustice with fauor, & that is to the rest and quietnes of his faithfull subiects, & to put away misdoers among them charitably: and therefore he will be contented that his Iustices shall helpe forth the offendours according to the trueth, as far as reason and iustice may suffer. And as the King will be contented therein, it is to presume that the Counsel will be contented, and so there is no daunger thereby, neither to the Court ne to the partie. And as I suppose for this reason it began that they should haue no counsell vpon indictments, & that hath so long continued that it is now growne into a custome, & into a maxime of the law, that they shall none haue. Do. But if the Iudges knew of their owne knowledge that the indictee is guiltie, and then he pleadeth Misnosmer, or a Record that hee was auerfors arraigned, and acquit of the same murther, or felonie, and the Iudges of their owne knowledge know that the plee is vntrue, may they not then bid him plead at his perill? S. I think yes, but if they know of their own knowledge that he were guilty of the murther or felonie, but that the plea was vntrue they knew not, but by coniecture or information, I thinke they might not then bid him plead at his perill.

¶ The second question of the Doctor, whether warrantie of the younger brother, that is taken as heire. because it is not knowne but that the eldest brother is dead, be in conscience a bar vnto the eldest brother, as it is in the law.

Cap.

Cap. 49.

A Man seised of lands in fee hath issue two sons, the eldest son goeth beyond the sea, and because a common voice is that he is dead, the ponger brother is taken for heire, the father dyeth, ỹ ponger brother entreth as heire, and alieneth the land with a warrantie, & dieth without any heire of his bodie, and after the elder brother commeth againe, and claimeth the land as heire to his father, whether shall he be barred by that warrantie in conscience as hee is in the law? St. It is a Maxime in the Law, that the eldest brother shall in that case be barred, and that Maxime is taken to bee of as strong effect in the Law, as if it were ordained by statute to bee a barre. And it is as old a law that such a warrantie shall bar the heire, as it is that the inheritance of the father shall onely descend to the eldest son. And sith the Law is so, why then should not conscience follow the Law, as well as it doth in that point, that the eldest son shall haue the land. Do. For there appeareth no reasonable cause whereupon the Maxime might haue a lawfull beginning: For what reason is it that the warrantie of an auncestor that hath no right to land, should bar him that hath right? And if it were ordained by Statute, that one man should haue another mans land, and no cause is expressed why he should haue it, in that case though hee might hold the land by force of that statute, yet he could not hold it in conscience, without there

were a cause why hee should haue it, & these cases bee not like as mee seemeth to the forfeiture of goods by an Outlawrie, for I will agree for this time, that that forfeiture standeth with conscience because it is ordained for ministration of iustice, but I cannot perceiue any such cause herein: and therefore me thinketh that this case is like to the Maritime, that was at the cõmon Law of wracke of the Sea, that is to say, that if a mans goods had bin wrecked vpon the sea, that the goods should haue bin immediately forfeited to the King. And it is holden by all Doctors that the Law is against conscience, except in certain cases that were too long to rehearse now. And it was ordained by the Statut of Westminster the 1. that if a Dogge or Cat come alme to the land, that the owner, if hee proue the goods within a yere and a day to be his, shall haue them, whereby the said Law of wrecks of the sea, is made more sufferable thã it was before: and some thinke in this case that this warranty is no bar in conscience, though it be a barre in the law. S. I pray thee keep that case of wrecke of the sea in thy remembrance, and put it hereafter as one of thy questions, & thereupon shew mee thy further minde therein, and I shall with good will shew thee my minde: and as to this cale that we be in now, me thinketh the Maritime whereby the warranty shalbe a barre, is good and reasonable, for it seemeth not against reason that a man shal be bound, as to temporall things, by the act of his auncestor to whom hee is heire: for like as by the law it is ordained, that hee shall haue aduantage by

the same auncestor, and haue all his landes by discent if hee haue any right, so it seemeth that it is not vnreasonable, though the Law for the priuitie of blod that is betweene them suffer him to haue a disauantage by the same auncestour: but if the Maxime were, that if any of his auncestours, though hee were not heire to him, made such a warrantie, that it should bee a bar, I thinke that Maxime were against conscience, for in that case there were no ground, nor consideration to proue how the said Maxime should haue a lawfull beginning, wher fore it were to bee taken as a Maxime against the law of reason: but me thinketh it is otherwise in this case, for the reason that I haue made before. D. If the father bind him and his heires to the payment of a debt and dye, in that case the sonne shall not bee bound to pay the debt, vnles he haue assets by discēt from his father. And so I would agree, that if this man haue assets by discent from the auncestor that made the warrantie, that he should haue bin barred: but els me thinketh it should stand hardly with conscience that it should be a barre. Stu. In that case of the obligation, the Law is as thou saist, and the cause is, for that the Maxime of the law in that case is none other, but that hee shall bee charged if hee haue assets by discent: but if the Maxime had beene generall, that the heire should bee bound in that case without any assets, or if it were ordained by Statute, that it should bee so, I thinke that both the Maxime and the Statute should well stand with conscience. And like law is where a man is vouched

as heire, he may enter as hee that hath nothing by discent, but where hee claimeth the land in his owne right, there the warranty of his ancestor shall be a bar to him, though hee haue no assets from the same auncestor, a though it bee said in Ezechiel Ca. 18. That the sonne shall not beare the wickednesse of the father, that is vnderstood spiritually. But as to temporall goods the opinion of Doctors is, that the sonne sometime may beare the offence of his Father Do. Now that I haue heard thy mind in this case, I will take aduisement therein till a better leasure, and will now proceed to another question. tu. I pray thee doe as thou saist, and I shall with good will make answere therto as well as I can.

¶ The 3 question of the Doctor; If a man procure a collaterall warrantie, to extinct a right that hee knoweth another man hath to land, whether it bee a barre in conscience as it is in the Law, or not.

Cap. 50.

A Man is disseised of certaine land, ℔ dissesor selleth the land &c. ℔ alienee knowing of the disseisin, obtaineth a release with a warranty of an ancestor collaterall to ℔ disseisee that knoweth also the right of the disseisee, that auncestor collaterall dyeth, after whose death the warrantie discendeth vpon the disseisee, whether may the alienee in ℔ case hold the land

in conscience as he may by the law.S. With the warrantie is discended vpon him, whereby hee is barred in the law mee thinketh that hee shall also be barred in conscience, and that this case is like to the case in the next Cha. before wherein I haue said that (as me thinketh) it is a bar in conscience D. Though it might be taken for a bar in conscience in that case, yet mee thinketh in this case it cannot: for in that case the ponger brother entred as heire, knowing none other but that hee was heire of right, and after when he sold the land, the buyer knew not but that hee that sold it had good right to sell it, and so he was ignorant of the title of the eldest brother, & that ignorance came by the default and absence of himselfe, that was the eldest brother. But in this case aswell the buyer, as he ꝑ made the collaterall warranty, knew the right of the disseisee, and did that they could to extinct the right, and so they did as they would not should haue been done to them: & so it seemeth ꝑ hee that hath the land may not with conscience keepe it. S. Though it be as thou saiest that all they offended in obtaining of the sayd collaterall warranty, yet such offence is not to be considered in the law, but it bee in verie speciall cases: for if such alleagings should be accepted in the law, releases, and other writings should bee of small effect, and vpon euerie light surmise, all writings might come in triall, whether they were made with conscience or not. Therefore to auoid that inconuenience, the law will driue the partie to answere onely whether it bee his deede or not, and not whether the deede were

made

made with conscience or against conscience, and though the party may bee at a mischiefe thereby, yet the law will rather suffer the mischiefe than the said inconuenience. And like law is if a woman Couert for dread of her husband by compulsion of him leuie a Fine, yet the woman after her husbands death, shall not bee admitted to shew that matter in auoyding of the Fine, for the inconuenience that might follow thereupon. And after the opinion of many men, there is no remedie in these cases in the Chancerie: for they say that where the common law in cases concerning inheritance putteth the partie from any auerment for eschewing of an inconuenience that might follow of it among the people, that if the same inconuenience should follow in the Chauncerie if the same matter should be pleaded there, that no Subpena should lie in such cases, & so it is in the cases before rehearsed: For asmuch vexation, delay, costs and expences might growe to the party if hee should bee put to answere to such auerments in the Chancery, as if he were put to answer to them at the common law: and therefore they thinke that no Subpena lyeth in the said cases nor in other like vnto thē. Neuertheless I do not take it that their opinion is that hee that bought the land in this case may with good conscience hold the Land, because he shall not bee compelled by no law to restore it, but that he is in conscience and by the law of reason bound to restore it or otherwise to recompence the party, so as hee shall bee contented, and I suppose verily it is so: he will keepe his soule out of perill and

danger. And after some men to these cases may bee resembled the case of a fine with nonclaime that is remembred before in the 14. Chap of this booke, where a man knowing another to haue right to certaine land, causeth a fine to be leuied therof with Proclamation, & the other suffereth 5. peres to passe without claime, in that case hee hath no remedie neither by common Law, nor by Subpena, & that yet he that leuied the fine, is bound to restore the land in conscience. And me thinketh I could right well agree that it should be so in this case, and that specially because the party himselfe knoweth perfectly that the sayd collaterall warrantie was obtained by couin & against conscience.

¶ The fourth question of the Doctor is of the wrecke of the Sea.

Cap. 51.

I Pray thee let mee now heare thy mind how the law of England concerning goods that be wrecked vpon the sea may stand with conscience, for I am in great doubt of it. S. I pray thee let me first heare thine opinion what thou thinkest therein. D. The statute of West. the 1. that speaketh of wreckes is, that if any man, dog or cat, come aliue into the land out of the Ship or Barge, that it shall not be iudged for wrecke, so that if the party to whom the goods belong come within a pere and a day and proue them to be his, that he shall haue the or else that they shall remaine to the king And me thinketh

that

that the said statute standeth not with conscience, for there is no lawfull cause why the partie ought to forfeit his goods, ne y the King or Lords ought to haue them, for there is no cause of forfeiture in the partie, but rather a cause of sorrow & heauines: And so the law seemeth to add sorrow vpō sorrow: And therfore doctors hold commonly, that he that hath such goods is bound to restitution, and that no custome may help, for they say it is against the cōmandemēt of God, Leu. 19. where it is commanded, that a man should loue his neighbour as himselfe, and that they say he doth not, that taketh away his neighbours goods: but they agree that if any man haue cost and labor for the sauing of such goods wrecked, specially for such goodes as would perish if they lay still in the water, as Suger, Paper, Salt, Meale, and such other, that hee ought to be allowed for his costs & labour, but he must restore the goods, except hee could not saue them without putting his life in ieopardie for them, and then if he put his life in such ieopardie, & the owner by cōmon presumption had had no way to haue saued them, then it is most commonly holden, that hee may keepe the goods in conscience: but of other goods that would not so lightly perish, but that the owner might of common presumption saue them himselfe, or that might be saued without any perill of life, the takers of them be bound to restitution to the owner, whether he come within the yeare or after the yeare.

And me thinketh this case is somewhat like to a case that I shall put: if there were a Law

a lo a cuſtome in this realm, or if it were ordeined by ſtatute, that if any alien came through the realme in pilgrimage, and dyed, that all his goods ſhould be forfeit, that Law ſhould bee againſt conſcience, for there is no cerule reaſonable why the ſaid goodes ſhould bee forfeit: And no more met thinketh there is of wrecke. S. There be others caſes where a man ſhal leſe his goods e no default in him: as where beaſts ſtray away from a man and they bee taken by and proclaimed, and the owner hath not heard of them within the yeare and the day, though hee made ſufficient diligence to haue heard of them, yet the goods bee forfeites and no default in him: a ſo it is where a man killeth another with the ſword of Iaet Stile, the ſword ſhall be forfeit as a Deodand, a yet no default is in the owner: and ſo me thinketh it may be in this caſe, and that ſith the common law, before the ſaid ſtatute, was, that the goods wrecked vpon the ſea, ſhall be forfeit to the king, that they bee alſo forfeit now after the Statute except they be ſaued by following the ſtatute, for the Law muſt needs reduce the propertie of all goodes to ſome man, and when the goods bee wrecked, it ſeemeth the propertie is in no man: but admit that the propertie remaine ſtill in the owner, then if the owner perceaſe would never claime, then it ſhould not bee knowne who ought to take them: and ſo might they be deſtroyed, and no profit come of them: wherefore me thinketh it reaſonable, that the Law ſhall appoint who ought to haue them, and that hath the Law appointed to the King as Soueraigne and head

ouer

ouer the people. Do. In the cases that thou hast put before of the strap and Deodand, there bee considerations why they be forfeit, but it is not so here: and mee thinketh that in this case, it were not vnreasonable that the Law would suffer any man that would take them, to take and keepe them to the vse of the owner, saving his reasonable expences, and this mee thinketh were more reasonable Law, than to pull a propertie out of the owner without cause. But if a man in the sea cast his goods out of the ship, as forsake, there Doctors hold that euery man may take them lawfully that will: But otherwise it is (as they say) if he throw them out for feare that they should ouercharge the ship.

S. There is no such Law in this Realme of goods forsaken: For though a man weiue the possession of his goods, and saith he forsaketh them, yet by the Law of the Realme the propertie remaineth still in him, and hee may seise them after when he will: And if any man in the meane time put the goodes in safegard to the vse of the owner, I thinke hee doth lawfully and that he shall bee allowed for his reasonable expences in that behalfe, as he shal be of goods found, but hee shall haue no propertie in them, no more than in goods found. And I would agree, that if a man prescribe, that if he find any goods within his manor, that hee should haue them as his owne, that that prescription were voide: for there is no consideration how the prescription might haue a lawfull beginning, but in this case me thinketh there is. D. What is that? S. It is this, The King of the old custome

some of the realme, as the Lord of the narrow sea is bound as it is said to scower the Sea of the Pirats & petit robbers of the sea. And so it is read of the noble king Saint Edgar, that he would twice in the yere scower the sea of such pirats: but I meane not thereby that the king is bound to conduct his Merchants vpon the sea against all outward enemies, but that he is bound onely to put away such Pirats and petit robbers. And because that cannot bee done without great charge, it is not vnreasonable if he haue such goods as he wrecked vpon the sea toward the charge. Vpon that reason I will take a respit till another time.

¶ The fift question of the Doctor, whether it stand with conscience to prohibit a Iury of meat and drinke till they be agreed.

Cap. 52.

If one of the xij. men of an enquest know the very trueth of his owne knowledge, and instructeth his fellowes therof, & they will in no wise giue credence to him, & thereupon because meat & drinke is prohibited them, hee is driuen to that point, that either he must assent to them and giue their verdict against his owne knowledge, and against his owne conscience, or dye for lacke of meat: how may the law then stand with conscience that will drive an innocent to that extremity, or be either forsworne, or to bee famished & die for want of meat. &c. I take not the law of the realme to be, that the Iurie after they

they be ſworne may not eat nor drinke till they be agreed of the verdict: but truth it is there is a Maxime, and an old cuſtome in the law, that they ſhall not eat nor drinke after they bee ſworne till they haue giuen their verdict without the aſſent & licence of the Iuſtices: & that is ordeined by the law for eſchewing of diuers inconueniencies that might follow thereupon, and that ſpecially if they ſhould eat or drinke at the coſts of the parties, and therefore if they doe contrarie, it may be laid in an arreſt of the iudgement: But with the aſſent of the Iuſtices they may both eat and drinke; As if any of the Iurors fall ſicke before they bee agreed of their verdict ſo ſore that hee may not commune of the verdict, then by the aſſent of the Iuſtices he may haue meat & drinke, and alſo ſuch other things as be neceſſary for him and his fellowes alſo at their owne coſtes, or at the indifferent coſtes of the parties if they ſo agree, or by the aſſent of the Iuſtices, may both eat and drink: and therefore if the caſe happen that thou now ſpeakeſt of, and that the Iurie can in no wiſe agree in their verdict, and that appeareth to the Iuſtices by examination, the Iuſtices may in that caſe ſuffer them to haue both meat and drinke for a time to ſee whether they will agree, and if they will in no wiſe agree, I think that the Iuſtices may ſet ſuch order in the matter, as ſhall ſeeme to them by their diſcretion to ſtand with reaſon and conſcience, by awarding of a new Enqueſt, & by ſetting fine vpon them that they ſhall find in default, or otherwiſe as they ſhall thinke beſt by their diſcretion, like

as they may doe if one of the Jurie dye before verdict, if any other like casualties fall in that behalfe. But what the Justices ought to doe in this case that thou hast put in their discretion, I will not treat of at this time.

¶ The 6. question of the Doctor, whether the colors that be giuen at the common Law in Assises, actions of trespasse, & diuers other actions, stand with conscience, because they be most cómonly feined, and be not true.

Cap. 53.

I Pray thee let me heare thy mind to what intent such colors bee giuen, and sith they bee commonly vntrue, how they may stand with conscience? S. The cause why such colors bee giuen is this: there is a Maxime and a ground of the Law of England, that if the defendant or tenant in any actiõ plead a plee that amounteth to the generall issue, that he shalbe compelled to the generall issue. and if he will not, hee shalbe condemned for lacke of answere, and the generall issue in Assise is, that he that is named the disseisor hath done no wrong, nor no disseisin. And in a writ of Entrie in the nature of Assise the generall issue is, that hee disseised him not. And in an action of Trespasse that he is not guilty, & so every action hath his generall issue assigned by the Law, and the Tenaunt must of necessitie either take the generall issue, or plead some plee in abatement of the writ, to the iurisdiction, to the partie, or else some barre or some matter by way of conclusion. And therefore if

I.

I. at S. in fee of H. Hart of land, and a stranger bringeth an assise against the said H. Hart, for the land, whose title hee knoweth not: In this case if hee should bee compelled to plead to the point of the assise, that is to say, that hee hath done no wrong ne no disseisin, the matter should be put in the mouths of 12. lay men, which bee not learned in the law, and therfore better it is that the law bee so ordered, that it be put in the determination of the Judges, than of lay men. And if the said H. Hart in the case before rehearsed, would plead in barre of the assise that Jo at Stile was seised, and enfeoffed him, by force whereof he entred and asked iudgement, if that Assise should lye against him, that plee were not good, for it amounteth but to the generall issue: and therfore he shalbe compelled to take the generall issue, or els the Assise shall bee awarded against him for lack of answere. And therefore to the intent the matter may be shewed and pleaded before the Judges, rather than before the Jurie, the tenaunts vse to giue the plaintife a colour, that is to say, a colour of action whereby it shall appeare that it were hurtfull to the tenant to put that matter that hee pleadeth to the iudgement of 12. men: & the most cõmon colour that is vsed in such case is this, when he hath pleded that such a man enfeoffed him, as before appeareth, it is vsed that he shal plead further, & say that the plaintife claiming by a colour of a deed of feoffement made by the said feoffor, before the feoffement made to him where no right passed by the deed, entred, vpon whom hee entred and asked Judgement if the

the Assise lye against him. In this case because it appeareth to bee a doubt to vnlearned men, whether the land passe by the deed without liuerie or not, therefore the law suffereth the tenaunt to haue that speciall matter to bring the matter to the determination of the Iuoges. And in such case the Iudges may not put the tenaunt from the plee, for they knew not as Iudges, but that it is true, + so if any default be it is in the tenant and not in the Court. And though the trueth bee, that there were no such deed of feoffement made to the plaintife as the tenant pleadeth, yet me thinketh there is no default in the tenaunt, for hee doth it to a good intent as before appeareth. D. If the tenãt know that the feoffor made no such deed of feoffement to the plaintife, then there is a default in the tenant to plead it: for hee wittingly sayeth against the truth, and it is holden by all doctors that euerie ly is an offence more or lesse, for if it be of malice, and to the hurt of his neighbour, then it is called Mendatiũ pernitiosum, and that is deadly sinne: and if it bee in sport, and to the hurt of no man, nor of custome vsed, ne of pleasure that hee hath in lying, then it is veniall sin, and it is called in latin, mendatium iocosum: and if it be to the profit of his neighbour and to the hurt of no man, then it is also veniall sin, and it is called in latin, mendatium officiosum: and though it bee the least of those three, yet it is a veniall sin and would bee eschewed. Stu Though the midwiues of AEgypt lyed when they had reserued the male children of the Hebrewes, saying to the king Pharao, that

the

the Hebrewes had women that were cunning in the same craft, which of they came had reserued the children alive, where in deed they themselues of pitie and of dread of God reserued them, yet Saint Hierome expounded the text following, which saieth, that our Lord therefore gaue them houses, that is to bee vnderstood, that hee gaue them spirituall houses, and that they had therefore eternall reward: and if they sinned by that lye, although it were but venial, yet I cannot see how they should haue therefore eternall reward. And also if a man intending to slay another, alke mee where that man is, is it not better for me to lye, and say, I cannot tell where hee is, though I know it, than to shew where hee is, whereupon murder should follow? Doct. The deede that the Midwiues of Ægypt did in sauing the children, was meritorious, and deserued reward euerlasting (if they beléeued in God) & did good deedes beside, as it is to suppose they did, when they for the loue of God, refused the death of the Innocents: and then though they made a lye after, which was but venial sinne, that could not take from them their reward, for a venial sinne doth not vtterly extinct charitie, but letteth the feruour thereof: and therefore it may well stand with the wordes of Saint Hierome, that they had for their good deed eternall houses, and yet the lye that they made to be a venial sinne: but neuertheleſſe, if such a lye that is of it selfe but venial, bee affirmed with an oth, it is alway mortal, if he knew it be falſe that he sweareth. And as to the other ques-

question, it is not like to this question that we
haue in hand as me seemeth: for sometime a mã
for eschewing of the greater euill may doe a
lesse euill, and thē the lesse is no offence in him,
and so it is in the case that thou hast put, wher-
in because it is lesse offence to say, hee wotteth
not where he is, though he know where he is,
than it is to shew where hee is, whereupon
murther should follow, it is therefore no sinne
to say hee wotteth not where hee is: for euerie
man is bound to loue his neighbour, and if hee
shew in this case where hee is, knowing his
death should follow thereupon, it seemeth that
hee loued him not, ne that hee did not to him as
he would be done to: But in the case that we
be in here, there is no such sinne eschewed: For
though the party pleadeth the generall issue,
the Iurie might find the truth in euerie thing,
and therefore in that he saieth that the plaintife
claiming in by the colour of a deed of feoffement,
were nought passed, entred &c. knowing that
there was no such feoffement, it was a lye in
him and a venial sinne, as mee thinketh. And
euerie man is bound to suffer a deadly sinne
in his neighbour, rather than a venial sinne in
himselfe.

Though the Iury vpō a generall issue, may
find the trueth as thou saiest, yet it is much
more dangerous to the Iury to inquire of many
points, than to inquire only of one point. And
forasmuch as our Lord hath giuē a cōmande-
ment to euery man vpon his neighbour: there-
fore euerie man is bound to force as much as in
him is, þ by him no occasion of offence come to
his

his neighboz. And foz ỹ same cause, ỹ law hath ozdained diuers maxtmes & pzinciples, whereby tssues in ỹ Kings court may be ioined vpon one point in certain as nigh as may be, and not generally, least offence might follow thereupon against God, & a hurt also vnto ỹ Jury, wherefoze it seemeth that he loueth not his neighboz as himselfe, ne that he doth not as he would be done to, that offereth such danger to his neighboz, where he may wel and conuenientlp keep it from him, if he will follow the ozder of ỹ law, & it seemeth that hee putteth himselfe wilfully in ieopardie that doth it, and it is wzitten Eccle. 3. Qui amat periculum, in illo perebit, that is to say, he that loueth perill, shall perish in it, & he ỹ putteth his neighboz in perill to offend, putteth himselfe in the same, and so should hee doe mee seemeth that would wilfully take the generall issue, where hee might conuenientlp haue the speciall matter: and furthermoze it is no offece in pzinces and rulers to suffer contracts, and buying and selling in Markets and Faires, though both periurie and deceipt will follow thereupon, because such contracts be necessaris foz the common wealth: so it seemeth likewise, that there is no default in the party that pleadeth such a speciall matter to auoyde from his neighbour the danger of periurie, ne yet in the court though they induce him to it, as they doe somtime foz the intent before rehearsed. And in likewise some will say, that if rulers of cities & communalties, sometime foz the punishment of felons, murtherers, & such other offendozs will (to the intent they would haue them to con-

fesse the trueth) say to them that be suspected that they be informed of such certaine defaults, or misdemeanors in the offendors, & that they doe to the intent to haue them to confesse the trueth, that though they were not so informed, that yet it is no offence to say they were so informed, because they do it for the cõmon welth: for if offendors were suffered to goe vnpunished, the common wealth would extreames decay & vtterly perish.

D. I will take aduisement vpon thy reason in this matter till another season, and I will now aske thee another question somewhat like vnto this, I pray thee let me heare thy mind therein.

St. Let me heare thy question, and I shall with good will say as I thinke therein.

¶ The 7. question of the Doctor concerning the pleading in Assise, whereby the tenaunts vse sometime to plead in such maner that they shal confesse no Ouster.

Cap. 54.

IT is commonly vsed as I haue heard say that when the tenant in Assise pleadeth that a stranger was seised and enfeoffed him, and giueth the plaintife a colour in such maner as before appeareth in the xlviij Chapter, that the tenant many times when hee hath pleaded thus, and the plaintife claiming by a colour of a deed of feoffement made by the said straunger, where nought passed by the deede, entred,

and

and that then they vse to say further vpon whom I. B. entred, vpon whom the tenaunt entred, where in deed the said I. B. neuer entred, ne happily there was neuer no such man: how can this pleading be excused of an vntruth and what reasonable cause can be why such a pleding should bee suffered against the truth? St. The cause why that manner of pleading is suffered, is this: If the tenant by his pleading confessed an immediate entre vpon the plaintife, or an immediate putting out of the plaintife, which in French is called an ouster, thē if the title were after found for the plaintife, the tenant by his confession were attainted of the disseisin. And because it may bee, that though the plaintife haue good title to the Land, that yet the tenant is no disseisor: Therefore the tenāts vse many times to plead in such maner as thou hast said before, to saue themselues from confessing of an Ouster, & so if there be any default, it is not in the Court, ne in the Law, for they know not the truth therein till it be tried: and mee thinketh also that there is in this case right little default or none in the tenaunt nor in his counsell, specially if the counsell know that the tenant is no disseisor. But as to that point I pray thee that thou as thou hast taken a respit to bee aduised, or that thou shew thy full mind in the question of a color giuen in Assise, whereof mention is made in the said 48. Chapter: that I likewise may haue a like respit in this case till another time, to bee aduised, and then I shall with good will shew thee my full mind therein.

D I am content it be as thou saist, but I pray thee that I may yet adde another question to the 2. questions before rehearsed of the colours in assise, & feele thy mind therein, because that soundeth much to the same effect that the other doe (that is to say) to proove that there bee diuers things suffered in the law to be pleaded & bee against the truth: and I pray thee let mee hereafter know thy mind in all these questions, & thou shalt then with a good will know mine. S. I pray thee shew me the case that thou speakest of. D. If a man steale a horse secretly in the night, it is vsed that thereupō he shalbe indicted at the kings suit, and it is vsed that in that indictment it shall be supposed that he such a day, and place with force and armes (that is to say) with staues, swords, and knives, &c feloniously stole the horse against the kings peace, & that forme must be kept in euery indictment, though the felon had neither sword nor other weapon with him, but that hee came secretly without weapon. How can it therefore bee excused, but that therein is an vntruth? It is not alleadged in the indictment by matter in deed that hee had such weapon, for the forme of an indictmēt is this.

Inquiratur p dño Rege, si A. tali die & Anñ apud talē locum vi & armis, videlicēt gladijs &c. talem equum talis hominis cepit &c.

And then if the twelue men be only charged with the effect of the bill, that is to say, whether he be guiltie of the felonie or not, and not whether hee bee guiltie vnder such maner and forme as the bill specifieth or not: and so when they

they say billa vera, they say true as they take the effect of the bill to be. And therefore if there were false latin in the bill of indictment, & the Jurie saith billa vera, yet their verdict is true: for their verdict stretcheth not to the trueth or falshood of the latin, but to the felonie, ne to the form of the words, but to the effect of the matter, & that is to inquire whether there were any such felony done by the person or not: and though the bill varie from the day, from ȳ yere, and also from the place where the felonie was done in, so it vary not from the shire that the felonie was done in, and the iurie saith billa vera, they have giuē a true verdict, for they are bound by their oath to giue their verdict according to the effect of the bill, & not according to the forme of the bill. And so is he ȳ maketh a vow bound likewise to that that by the Law is the effect of his auow, and not onely to the words of his auow. And if a man auow never to eat white meat, yet in time of extreame necessitie, he may eat white meat, rather than dye, & not breake his auow, though he affirmed it with an othe: for by the effect of his auow, extreme necessity was excepted, though it were not expressly excepted in the words of the auow: & so likewise though the words of the Bill bee to inquire whether such a man such a day and yeare, and in such a place did such a felonie, yet the effect of the bill is to inquire whether he did the felonie within the shire or no: & therefore the Justices before whome such Indictments bee taken, most commonly informe the Jurie that they are bound to regard the effect of the bill, & not the forme.

And therefore there is no vntrueth in this case neither in him that made the bill, ne yet in the Iurie, as me seemeth. D. But if the partie that owed the horse bring an action of trespasse, and declareth that the defendant toke his horse with force and armes, where hee tooke him without force and armes: how may the plaintife there be excused of an vntrueth? S. And if the plaintif surmise an vntrueth, what is that to the Court, or to the law, for they must beleue the plaintif, till that that he saith be denied by the defendāt. And yet as this case is, there is no vntrueth in the plaintife, to say he toke the horse with force and armes, though he came neuer so secretly, & without weapon, for euerie trespasse is in the law done with force and armes, so that if he be attainted and found guilty of the trespas, hee is attainted of the force and armes: And sith the law adiudgeth euery trespasse to bee done with force, therefore the plaintife saith truely that he toke him with force, as the law meaneth to bee force. For though he toke the horse as a felon, yet vpon the felonious taking, the owner may take an action of trespas if he will, for euery felonie is a trespasse and more. And so I haue shewed thee some part of my minde to proone that in those cases there is no vntrueth, neither in the parties, neither in the Iurie, nor in the Law. Neuertheleese, at a better leasure I will shew thee my mind more fully therein with good will as thou hast promised mee to doe in the cases of colours of the Assise, and of the ouster, that be before rehearsed.

¶ The

¶ The viij question of the Doctor, whether the Statute of xlv. of Edward the third of Silua cedua stand with conscience.

Cap. 55.

IN the 45. yere of the raigne of Ed. 3. It was enacted, that a prohibition should lie where a man is impleaded in the court Christian for Wimes of wood of the age of xx. yere or aboue, by the name of Silua cedua; how may that Statute stand with conscience that is so directly against the liberte of the Church, and that is made of such things as the parliament had no authoritie to make any law of? St. It appeareth in the said Statute, that it is enacted, that a Prohibition should lie in that case, as it had vsed to do before that time, and if the prohibition lay by a prescription before the Statute, why is not then the Statute good as a confirmation of that prescription? D. If there were such a prescription before the Statute that prescription was vnde, for it prohibiteth the payment of Tythes of trees of the age of xx. yere or aboue, and paying of tithes is grounded aswell vpon the law of God, as vpon the law of reason, and against those Lawes lieth no prescription as it is holde mõnly by all men. S. That there was such a prescription before the said Statute, & yf a man before the said Statute had bin sued in the spirituall court for tithes of wood of the age of xx. yere or aboue. the prohibition lay, as

appeareth in the said statute: and it cannot be thought that a statute that is made by authority of the whole realme, aswell of the King and of the Lords spirituall & temporal, as of all the commons, will recite a thing against the truth: & furthermore I cānot see how it can be grounded by the law of God, or by the law of reason, that the x. part should bee paied for tith and no other portion but that, but I thinke that it bee grounded upon the Law of reason that man should giue a reasonable portion of his goods temporall to them that minister to him things spirituall, for euery man is bound to honor God of his proper substance, and the giuing of such portion hath not bin only used among faithfull people, but also among vnfaithfull as it appeareth Gene. 47. where Corne was giuen to the priests in Egypt of cōmon barns. And S. Paul in his Epistles affirmeth the same in many places, as in his first Epistle to the Cor. cap. 9. where he saieth, He that worketh in the church, shall eate of that that belongeth to the Church: And in his Epistle to the Gal. cap. 6 he saieth, Let him that is instructed in spirituall things, depart of his goods to him ꝙ instructeth him: And S. Luke cap. 10 saith, That the workeman is worthie to haue his hire. All which sayings may right conueniently be taken and applied to this purpose, that spirituall men which minister to the people spirituall things, ought for their ministration to haue a competent liuing of them that they minister vnto. But that the tenth part should be assigned for such a portion and neither more nor lesse, I cannot perceiue

that

that that should bee grounded by the Law of reason, nor immediatly by the Law of God: for before the Law written there was no certaine portion assigned for the spirituall Ministers, neither the x. part, nor the xx. part, vnto the time of Iacob: for it appeareth Gene. 28. that Iacob anowed to pay Dismes which was among the Iewes for the x. part, if our Lord prospered him in his iourney, and if the x. part had beene duetie before that anow, it had bin in vaine to haue anowed it, and so it had if it had bin grounded by the Law of reason: and as to that is spoken in the Euangelists, and in the new Law of Tythes, it belongeth rather to the giuing of tythes in the time of the old law, than of the new Law, as appeareth Mathew 23 and Luke 11. where our Lord speaketh to the Pharises, saying, Woe to our Pharises & tithe mints, rue, and herbes, & forget the iudgement and the charity of God, these it behoueth you to doe, and the other not to omit, that is to say, it behoueth you to doe Iustice, and charity of God, & not to omit paying of tythes though it be of small things, as of mints, rue, herbes, and such other. And also that the Pharise sayth Luke 17 I pay my tythes of all that I haue, it is to bee referred to the old Law not to the time of the new Law: Therfore as I take it the paying of Tythes, or of a certaine portion to spirituall mē for their spirituall ministration to the people hath bin grounded in diuers maners: First before the law writtē, a certaine portion sufficient for the spirituall Ministers was due to them by the Law of nature, which after

after them that bee learned in the Lawe of the Realme is called the law of reason, & that portion is due by all lawes. And in the law written, the Jewes were bound to giue the x. part to their priests aswell by the said anow of Iacob, as by the law of God in the old Testament called the Judicialis. And in the new law the paying of the x. part, is by a law that is made by the Church. And the reason wherefore the x. part was ordained by the church to be payed for the tithe was this; There is no cause why the people of the new law ought to pay lesse to the ministers of the new law, that the people of the old Testament gaue to the ministers of the old Testament: For the people of the new Law be bound to greater things than the people of the old Law were, as it appeareth Mat. 5. where it is said: Vnlesse your good workes abound aboue the workes of the Scribes & the Pharises, ye may not enter into the Kingdome of heauen. And the sacrifice of the old law was not so honourable as the sacrifice of the new Law is: for the sacrifice of the old law was only the figure, and the sacrifice of the new law is the thing that is figured, that was the shadow, this is the truth. And therefore ỹ Church vpon that reasonable consideration ordayned, that the x. part should be paid for the sustenāce of the Ministers in the new Law, as it was for the sustenance of the Ministers in the old law, & so that law with a cause may be increased or minished to more portion or to lesse as shall be necessarie for them. Doct. It appeareth Gen. 14. that Abraham gaue to Melchisedech tithes,

dismes, and that is taken to be the x. part, and that was long before the law written, & therefore it is to suppose, that hee did that by the law of God. S. It appeareth not by any Scripture that he did that by the commandement of God, ne by any reuelation: And therfore it is rather to suppose that he did part of duety, and part of his owne free will, for in that he gaue the dismes as a reasonable portion for the sustenance of Melchisedech and his ministers, he did it by the commaundement of the Law of reason, as before appeareth, but that hee gaue the x part, that was of his free will, & because he thought it sufficient & reasonable: but if he had thought the xij. part, or the xiij. part had sufficed, hee might haue giuen it, and that with good conscience. And so I suppose that in the new law, the giuing of the x. part is by a Law of the Church, and not by the Law of God, but elles it be taken that the law of the church is the law of God, as it is sometime taken to bee, but not appropriatly or immediatly, for that is taken appropriatly to be the law of God, that is contained in scripture, that is to say, in the old testament and in the new. Doct. It is somewhat dangerous to say that tythes bee grounded only vpon the law of the Church: for some men, as it is said, say that mans Law bindeth not in conscience, & so they might happen to make a boldnesse therby to deny their tithes. S. I trust there be none of that opinion, & if there be it is great pitie: And neuertheless they may be compelled in that case by the law of the Church to pay their tithes as well as they should be if paying

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of tithes were grounded meerely vpon the law of God. D. I thinke well it be as thou saist, and therefore I hold me contented therein. But I pray thee shew mee thy minde in this question. If a whole country prescribed to pay no tithes for Corne or hay, nor such other, whether thou thinke that that prescription is good. St. That question dependeth much vpō that that is said before: for it paying of the x. part be by the law of reason, or by the law of God, thē ꝑ prescription is void, but if it be by the law of man, then it is a good prescription, so that the Ministers haue a sufficient portion beside. D. Iohn Gerson which was a Doctor of diuinitie, in a treatise that he named Regulæ morales, saith, that Dismes be paied to Priests by the law of God. S. The words that he speaketh there of the matter be these, Solucio decimarū sacerdotibus, est de iure diuino, quatenus inde sustētēt: sed quoad tam hanc vel illā assignare, aut in alios redditus cōmutare, positiui iuris existit, that is thus much to say, The paying of dismes to Priests, is of the law of God, ꝑ they may therby be sustained, but to assigne this portion or ꝑ, or to chāge it to other rents, that is by the law positiue: & if it should bee taken that by that word Decimarū, which in English is called dismes or tithes, that he meant the x. part, and that that x. part should be paid for tithe by the law of God, then is the sentence that followeth after against that saying: for as it appeareth above, the next saith afterward thus, but to assigne this portion or that, or to change it into other rents belongeth to the law positiue, that is, to the law

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of man, and if the x. part were assigned by God, then may not a lesse part be assigned by the law of man, for that should be contrarie to the Law of God, and so it should bee void. And mee thinketh that it is not likely that so famous a clerk would speake any sentence contrary to the law of God, or contrarie to that he had spoken before: & to proue he meant not by the terme Decimæ, that dismes should alway be taken for the x. part, it appeareth in the 4. part of his workes in the 32. title Letere, where he saieth thus, Nõ vocatur portio curatis debita propterea decimę, eo quod semper sit decima pars, immo est interdum vicesima aut tricesima: That is to say, the portion due to curats, is not therfore called dismes, for þ it is alway þ x. part, for sometime it is the xx. or the xxx. part: and so it appeareth that by this word decimarũ, he meant in the text before rehearled a certaine portion, & not precisely the x. part, and that the portion should bee paid to Prelats by the law of God, to sustaine them with, taking as it seemeth the law of reason in that saying for the law of God, as it may one way be well and conuenently taken: because the law of reason is giuen to euery reasonable creature by God. And then it followeth pursuantly, that it belongeth to the law of man to assigne this portion or that, as necessitie shall require for their sustenance, and then his saying agreeth well to that that is said before, that is to say, that a certaine portion is due for prelats, for their spirituall ministration by the law of reason. And then it would follow thereupon, that if it were ordained for a law, that all

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paying of tythes should from henceforth cease, & that euerie curat should haue assigned to him such certain portion of land, rent, or annuity, as should be sufficient for him, & for such ministers as should be necessarie to bee vnder him, according to the number of the people there, or that euerie Parishoner or householder should giue a certain sum of mony to ỹ vse. I suppose the law were good: & that was the meaning of Io. Gerson, as it seemeth in his words before rehersed, where he saith, but to chaunge tythes into other rents, is by the law positiue, that is to say, by the Law of man. And some thinke that if a whole Countrie prescribe to bee quite of both tythes of corne or grasse, so that the Spirituall Ministers haue a sufficient portion beside to liue vpon, that is a good prescription, & ỹ they should not offend, that in such countries payed no tythes: for it were hard to say, that all the men of Italie, or of the East parts bee damned, because they pay no tythes, but a certaine portion after the custome: therefore certain it is, to pay such a certaine portion, aswel they as all other be bound, if the church aske it, any custome notwithstanding. But if the Church aske it not, it seemeth that by that not asking, the church remitteth it, & an example therof we may take of the Apostle Paul, that though hee might haue taken his necessarie liuing of them that he preached to, yet he toke it not, & neuertheles they that gaue it him not, did not offend because he did not aske it. But if one man in a town would prescribe to be discharged of tythe of corne & grasse, mee thinketh the prescription

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is not good, vnles he can proue ꝑ hee recompenceth it in another thing: for it seemeth not reasonable that hee should pay lesse for his tythes than his neighbors do, seeing that the spiritual ministers are bound to take almuch diligẽce for him, as they be for any other of ꝑ parish: wherefore it might stãd with reason that he should be cõpelled to pay his tithes as his neighbors doe, vnles he can proue that he paieth in recompẽce thereof, more than the x. part in another thing. Neuertheles I leaue the matter to ꝑ iudgemẽt of other, & then for a further proufe, though the said prescription of not paying tithes for trees of 20. yere & aboue, were not good, yet that that of corne & graffe should be good, some make this reasõ: they say, ꝑ there is no tith but it is either a prediall tith, or a personall tith, or a mixt tith, & they say ꝑ if a tith should be paid of trees whẽ they be sold, that the tythe were not a prediall tith, for the prediall tith of trees is of such trees as bring forth fruits & increase perely, as apple trees, nut trees, peare trees, & such other, whereof the prediall tith is the apples, nuts, peares, & such other fruits as come to thẽ perely, & when the fruits bee tithed, if the owner after fell the trees, there is no tith due thereby, for two tiths may not be paid of one thing, & of those tithes, ꝑ is to say, of predial tithes was the cõmandmẽt giuen in the old law to the Iewes, as appeareth Leuit. 27. where it is said, Omnes decimæ terræ, siue de pomis arborum, siue de frugibus, domini sunt, & illi sanctificãtur, that is to say, all tiths of the earth, either of apples, of trees, or of graines, be our lords, & to him they be sanctified,

and

and though the said Law speaketh only of apples, yet it is vnderstood of all maner of fruits. And because it saieth that all the tythes of the earth be our Lords, therefore calues, lambes, and such other must also be tythed, and they bee called by some men prædiall tythes, that is to say, tythes that come of the ground, howbeit they call them onely Predials mediate, & they bee the same tythes that in this writting bee called mixt tithes, and the other tythes (that is to say) tythes of apples & cozne, & such other bee called Predials immediate, for they come immediatly of the ground, and so do not mixt tythes, as euidently appeareth. Do. But what thinkest thou shall be the prædiall tythes of ashes, elmes, fallowes, alders, and such other trees as beare no fruits, whereof any profit commeth, why shall not the 10. part of the selfe thing bee the tythe thereof, if they be cut downe aswell as it is of cozne and grasse? St. For I think that there is to that intent great diuersitie betweene cozne, grasse, and trees, and that for diuers considerations, whereof one is this: The property of cozn & grasse is not to grow ouer one yere, and if it doe, it will perish and come to nought, and so the cutting downe of it, is the perfection and preseruation thereof, and the speciall cause that any increase followeth of the same: And therefore the tenth part of the increase shall be payd as a prædiall tythe, and there no deduction shall bee made for the charges of it: And so it is of sheepe and beasts that must bee taken and killed in time, for els they may perish and come to nought: but when trees be felled, that felling

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is not the perfection of the trees, ne it causeth not them increase, but to decay: For most commonly the trees would bee better if they might grow still. And therefore vpon that that is the cause of that decay & distruction of them, it seemeth there can no prædial tith arise: & some mē say that this was the cause why our Lord in the said Chapter of Leuit. 27. gaue no commaundement to tythe the trees, but the fruits of the trees onely. Do. It appeareth in Paralip. 31. that the Iewes in the time of the king Ezechias offered in the Temple all things that the ground brought forth, and that was trees as well as corne & grasse. &c. It appeareth not that they did that by the commaundement of God, and therefore it is like that they did it of their owne deuotion, and of a fauour that they had aboue their ducte to the repairing of the Temple, which the king Ezechias had thē cōmaunded to be repaired: And so that text proueth nothing that tythe should bee payed for trees: And therfore they say farther, that truth it is, that if a man to the intent hee would pay no tythe, would wilfully suffer his Corne and grasse to stand still and to perish, hee should offend conscience thereby: but though hee suffer his trees to stand still continually without felling, because hee thinketh a tythe would bee asked, if he felled them (so that he doe it not of an euill will of the Curate) hee offendeth not in conscience, ne hee is not bound to restitution therefore, as he should be if it were of corne and grasse, as before appeareth. And another diuersitie is this: In this case of tythe wood, &

tythe thereof would serue so little to that purpose that tythes be paied for, that it is not likely that they that made the Law for payment of tithes intended that any tithe should bee paied for trees or wood: For the spirituall ministers must of necessitie spend dayly and weekely, and therefore the tithes of trees or wood that commeth so seldome, would serue so little to the purpose that it should be paid for, that it would not helpe them in their necessitie: So that if they should bee driuen to trust thereto, though it might helpe him in whole time it should happen to fall, yet it should deceiue them that trusted to it in the meane time, and also should leaue the Parish without any to Ministler to them. D. I would well agree that for trees that beare fruit there should no predial tith be paid when they be sold (for the predial tithe of them is the fruits that come of them) and so there connot bee two predials of one thing, as thou hast saide. But of other trees that beare no fruit, mee thinketh that a predial tythe should bee paied when they be sold, and so it appeareth that there ought to bee by the constitution prouinciall made by the reuerend Father in God Robert Winchelsie late Archbishop of Canterburie, where it is said and declared, that Silua cedua is of cuerie kind of trees that haue being in that they should bee cut, or that bee able to bee cut, whereof wee will, saith he, that the possessour of the said woods bee compelled by the censures of the Church to pay to the Parish Church, or mother Church, the tithe as a reall or predial tithe: And so by vertue of that con-

stitution

ſtitution prouinciall a predial tyth muſt be paid of ſuch trees as haue no fruite: For I would well agree that the ſaid conſtitution prouincial ſtretcheth not to trees ꝑ beare fruit as though ꝑ woods be generall for all trees (as before appeareth.) Stu. I take not the reaſon why a predial tyth ſhould not be paid for trées that beare fruit to bee, becauſe two predialt tythes cannot be paid for one thing: for when the tyth is paid of lambes, yet ſhall tythe be paid of woll of the ſame ſheepe (for it is paid for another increaſe) and ſo it may bee ſaid that the fruit of a tree is one increaſe, and the felling another: But I take the cauſe to bee for the two cauſes before rehearſed, & alſo foraſmuch as the felling is not properly an increaſe of the trees but a deſtruction of the trees, as it is ſaid before. And farther I would heare thy mind vpon the ſaid conſtitution prouinciall, which will, that tythe ſhould be paid for trées by the poſſeſſors of the wood, that if the poſſeſſour ſell the wood for C. l. and giue the buyer a certain time to fell it in, what tyth ſhall the poſſeſſor pay as long as the wood ſtandeth? Do. I thinke none, for the predialt tythe commeth not till the wood bee felled, and a perſonall Tythe bee cannot pay, no more than if a man plucke downe his houſe and ſelleth it, or if he ſel all his land, in which caſes I agree well he ſhall pay no tythe neither perſonall nor predialt. Stu. And then I put caſe that the buyer ſelleth the wood againe as it is ſtanding vpon the ground to another for CC. l. what tythe ſhall be paid then? Doct. Then the firſt buyer ſhall pay tythe of the ſurpluſage that

he taketh ouer the C.l. that he paied as a Parsonall Tithe. Stu. And then if the second buyer after that cut it downe and sell it when it is cut downe for lesse then he paid, what tith shall then be paid?

D. Then shall he that selleth them pay ꝑ tith for the trees as a prediall tithe &c. I cannot see how that can bee, for hee neither hath the trees, that the prediall tithe should be paid for, if any ought to be paid, nor he is not possessour of the ground where the trees grow: And therefore if any prediall tithe should be paied, it should be paied either by the first possessour by reason of the wordes of the said constitution prouinciall, which be, that the tithe shall be paid by the possessour of the wood, or by the last buyer, because hee hath the trees that should bee tithed, and by the first possessour the tithe cannot bee paied as a prediall for hee cut them not downe, ne they were not cut downe vpon his bargaine, and by the last buyer it cānot be paied neither as a prediall tithe, for the said constitution saith, that the possessour of the woods should be compelled to pay it. And therefore I suppose that the troth is, that in that case no tith shall bee paied, for as to the last seller, hee shall pay no personall tithe, for hee gained nothing, as it appeareth before, and no prediall tithe shall bee paied, for it should bee against the said prescription, and also the cutting downe is the distruction of trees and not their preseruation, as is said before.

D. Then takest thou the said constitution to be of small effect, as it seemeth. S. I take it to be

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of this effect, that of wood aboue twentie yeare it bindeth not, because it is contrarie to the cõmon law, and to the said prescription, that standeth good in the common law: but of wood vnder xx. yere whereof tith hath been accustomed to bee paied, the constitution is not against the said prescription, because paying of tithe vnder xx. yeare is not prohibited, but suffered by the said statute: howbeit some say, that by the very rigour of the common Law tythes should not be payed for wood vnder xx. yeare, no more than for aboue xx yere, and that Prohibition in that case lyeth by the common law: Neuertheless, because it hath bin suffered to the contrary, and that in many places tythe hath bin paid thereof, I passe it ouer, but where tyth hath not bin payed of wood vnder xx. yeare, I thinke none ought to be payed at this day in law nor conscience: But admit, that the sayd constitution taketh effect for payment of the wood vnder xx. yeares as of a prediall tythe, yet I cannot see how the tythe thereof should bee payed by the possessour of the wood, if he sell them, but that it should bee payed rather by him that hath the trees, for the constitution is, that the tythe shall be payed as a reall or prediall tyth, and that is the tenth part of the same trees, as it is of corn. And if a man buy corne vpon the ground, the buyer shall pay the tythe and not the seller, and so it should seeme to be here, and what the constitution meant to decree the contrarie in tythe wood, I cannot tell, vnlesse the meaning were to induce the owners to pay Tythes of great trees when they sell them to their owne vse:

which mee thinketh should bee verie hard to stand with reason, though the said statute had never been made, as I haue said before. And furthermore I would here (vnder correction) moue one thing, & that is this; That as it seemeth that they that were at the making of the said Constitution, & knew the said prescriptiō, did not follow the direct order of charity therein so perfectly as they might haue done: For when they made the said constitution pronunciall directly against the said prescription, they set Law against custome, and power against power, and in maner the Spiritualtie against the Temporalty, whereby they might well know that great variance & suit should follow; And therefore if they had clerely seene that the said prescription had beene against conscience they should first haue moued the King and his counsell & the nobles of the realme to haue assented to the reformation of that prescription, and not to make a law as it were by authoritie & power against the Prescription, and then to threat the people, & make them beleeue that they were all accursed that kept the said Prescription or & maintained it. And it seemeth to stand hardly with conscience to report so many to stand accursed for following of the said statute and of the said prescription as there doe, and yet to do no more than hath been done to bring them out of it. &c. Mee thinketh that it is not conuenient that lay men should argue the lawes and the decrees or constitutions of the Church, and therefore it were better for them to giue credēce to spirituall rulers that haue cure of their

soules

soules than to trust to their owne opinions, and if they would doe so, then such matters would much the more rather cesse, than they will go by such reasonings. &c. In that that belongeth to the articles of the faith, I thinke the people be bound to beleeue the Church, for the Church gathered together in ℣ holie Ghost cannot erre in such things as belong to the Catholique faith: But where the church maketh any lawes whereby the goods or possessions of the people may be bound, or by this occasion or that may be taken from them, there the people may lawfully reason whether the Lawes binde them or not, for in such Lawes the Church may erre and bee deceiued, and deceiue other, either for singularitie, or for couetice, or some other cause: and for that consideration it pertayneth most to them that bee learned in the Lawe of the realme to know such lawes of the Church, as treat of the ordering of lands or goods & to see whether they may stand with the Lawes of the realme or not: And therfore it is necessary for them to know the Lawes of the Church that treat of Dismes, of Executors, of testaments, of Legacies, bastardie, matrimonie, and diuers other, wherein they bee bound to know when the Law of the Church must be followed, and when the law of the realme; whereof because it is not our purpose to treat, I leaue to speake any more at this time, and will resort againe to speake of Tythes, wherein some men say that of Tinne, Cole, and Lead, no tythe should bee payed when they be sold by the owner of the ground, because it is part of the inheritance,

and it is more rather a distruction of the inheritance, than an encrease: And therefore they say, that if a man take a Tinne worke, and giue the Lord the tenth dish according to the Custome, that the Lord shall pay no tythe of that tenth dish, neither prediall nor personall, but if the other that taketh the worke haue gaines & aduantage by the worke, it seemeth that it were not against reason that hee should pay a personall Tithe of his gaines, the charge deducted. Do. I pray thee shew me first what thou takest for a personall tythe, and vpon what ground personall tithes be paid as thou thinkest, so that one of vs mistake not another therein. I will with good will: and therefore thou shalt vnderstand that, as I take it, personall tythes be not paid for any increase of the ground, but for such profit as commeth by the labour or industrie of the person, as by buying and selling, and such other, and such personall tythes, as I take it, must be ordered after the Custome, and the Church hath not vsed to leuie those Tythes of compulsion, but by conscience of the partyes: Neuertheless Raimond saith, that it is good to pay personall tythes, or with the assent of the parson to distribute them to poore men, or els to pay a certain portion for the whole. But as Innocent saith, where the custome is, that they should bee payed, the people bee bound to pay them aswell as predialls, the expences deduct. Howbeit in the Church of England they vse to sue for such personall tythes as well as for predials, & that is by reason of the constitution prouinciall, that was made by Robert Winchelsie,

chelsie, By the which it was ordeyned, that personall Tythes should be paid of crafts and Merchandise, and of the lucre of buying and selling, & in likewise of Carpenters, Smiths, weauers, Masons, and all other that worke for hire, that they shall pay tythes of their hire except they will giue any thing certaine to the vse, or the light of the Church, if it so please the Parson: And in another place the sayd Archbishop sayeth, that of the pawnage of woods, and such other things &c. and of fishings, trees, bees, doues, and of diuers other things there remembred, and of crafts, and of buying and selling, & of the profits of diuers other things there recited, euerie man should helpe satisfie competently in the Church, to the which they bee bound to giue it of right, no expences by the giuing of the sayd Tythes deducted or withholden, but onely for the payment of tythes of crafts and of buying and selling: And by reason of the said constitutions prouincialls, sometimes suites bee taken in the Spirituall Court for personall tythes, and thereof many men do marueile, because deductions many times must bee referred to the conscience of the parties. And they marueile also why a Law should bee made in this realme for paying of Personall tythes, more than there is in other Countries. And here I would gladly moue thee farther in one thing concerning such personall tythes, to know thy mind therein, and that is, If a man giue to another a horse, and hee selleth that horse for a certaine summe, shall hee pay any tythe of that summe?

D. What

Do. What thinkest thou therein? St. I thinke that he shall pay no tythe: For there as I take it the profit commeth not to him by his owne industrie, but by the gift of another, and as I take it, personall tythes be not payed for euerie profit or aduantage that commeth newly to a man, except it come by his owne industrie or labour, and so it doth not here. And also if he should pay tythe of that he sold the horse for, hee should pay tythe for the herle whole value of the thing. And as I take it, the personal tythes for buying and selling shall neuer bee payed for the value of the thing, but for the cleere gaines of the thing: And therefore I take the cases before rehearsed, where a man selleth his land, or pulleth downe a house, and selleth the stuffe, that hee should there pay no tith, that it is there to be vnderstood, that he hath not land or house by gift or by descent: For if a man buy land, or buy timber and stuffe of a house, and sell it for a gaine, I suppose that hee should pay a personall tythe for that gaine. And this case is not like to a fee or annuitie graunted for counsell, where the whole fee shall bee tythed for ẏ charges deducted, or some certaine summe for it by agreement, for there the whole fee commeth for his counsell, which is by his owne industrie. But in the other case it is not so, and the same reason as for the personal tythe might be made of trees, when they descend or be giuen to any man, and hee selleth them to another, that hee shall pay no personall tythe. Do. Me thinketh that if the horse amend in his keeping, & then he sell the horse, that then the tythe shalbe payed

of

of that that the horse hath increased in value after the gift, and so it may be of trees, that hee shall pay tithe of that that the trees may bee amended after the gift or descent. &c. Then the tythe must be the x. part of the increase the expences deducted, and then of trees the charges must also be deducted, for it is then a Parsonall tythe, and there is no tree that is so much worth as it hath hurt the ground by the growing: therefore there can no Parsonall tith bee paied by the owner of the ground when hee selleth them, though they haue increased in his time. Neuertheless I will speake no farther of that matter at this time, but will shew thee, that if Tin, Lead, Cole, or trees bee sold, that a mixt tythe cannot grow thereby; For a mixt tythe is properly of Calues, Lambes, Pigs, and such other that come part of the ground that they bee fed of, and part of the keeping, industrie, and ouersight of the owners, as it is said before: But Tin, Lead, and Cole are part of the ground and of the freehold, & trees grow of themselues, and be also annexed to the freehold, and will grow of themselues: and also the mixt tythe must be payed yerely at certaine times appointed by the Law or by custome of the countrie, but it may happen that Tinne, lead, cole, & trees shall not be felled or taken in many yeres, & so it seemeth it cannot be any mixt tithe, & these be some of the reasons, which they y would maintein that stat. & prescription to be good, make to proue their intent as they thinke.

D. What think they, if a man sell the lops of his wood, whether any tith ought there to be paid?

S They

S. They thinke all one law of the trees and of the lops. Do. And if hee vse to fell the lops once in xij. or xbj. yeare, what hold they then? St. That is all one. D. And what is the reason why Tithe ought not bee payed there aswell as for wood vnder xx. yeare? St. For they say, that the lops are to be taken of the same condition as the Trees bee what time soeuer they be felled, and that no custome will serue in that case against the Statute, no more that it should do of great trees. D. And what hold they of the barke of the trees? Stu. Therein I haue not heard of their opinion, but it seemeth to be one Law of the lops. Doct. I perceiue well by that thou hast said before, that thy minde is, that if a whole Countrie prescribe to be quite of Tythes of trees, coyne, and graffe, or of any other tythes, that that prescription is good, so that the spirituall ministers haue sufficient bede to liue vpon, doest thou meane so? S. Yes verily. D. And then I would know thy minde, if any man contrarie to that prescription were sued in the Spirituall Court for Coyne and graffe, or any other Tythes, whether a Prohibition should lye in that case, as it did after thy minde before the said Statute, where a man was sued in the Spirituall Court for Tythe Wood.

S. I thinke nay. D. And why not there, aswell as it did where a man was sued for the tythe wood? S. For as I take it, there is great diuersitie betweene the cases, and that for this cause; There is a Maxim in the law of England, that if any suit be taken in the Spiritual

Court

court whereby any goods or lands might bee recouered, which after the grounds of the law of the Realme ought not to bee sued there, though percase the Kings Court shall hold no plee thereof, that yet a Prohibition should lie, and after when it had continued long that no tythes were paied of wood, because of the said prohibition, and that after by processe of time some Curats began to alke Tithes of wood, contrarie to the Law and contrarie to the said preser ption, so that variance began to rise betweene Curats and their Parishoners in that behalfe, then for appeasing the said variaunce the said Statute was made, and that as it seemeth more at the calling on of the spiritualtie, than of the Temporalty; For the statute doth not expresselp graunt that the Prohibition in that case of tythe wood should lye so largely as some say it lay by the Law: Howbeit, it doth not restraine the Common Law therein, as it appeareth euidently by the words of the Statute, and so after same men it appeareth before the Statute, and also after the Statute (as I haue touched before) that the spirituall Court ought not in that case to haue made any processe for tithe wood: and therefore if they did, a Prohibition lay by the cómon Law. And like law is if ỹ spirituall court make proces vpon such a Legacie as by the law of the realme is void. As if a man bequeth to one another mãs horse, & the spirituall court thereupon maketh Processe to execute that legacie, there a Prohibition lyeth: For it appeareth euidently in the libell, if all the truth appeareth in the libel, that in

in the law of the realme the legacie is voide to all intents: And that hee to whom the legacie is made, shall neither haue the horse nor the value of the horse. And in likewise if a man sell his land for C.l. and he is sued after in the spirituall court for tithe of the said C.l. There a prohibitiō shall lye, for it appeareth in that case onely in ꝑ libell that no tythe ought to be paied, and that the spirituall Law ought not in that case to make any proceese whereby the goods of him that sold the land might be taken from him against the law of the Realme. And vpon this ground it is, that if a man were sued in the Spirituall Court, now sith the statute for a Mortuarie, that a Prohibition should lye, for it appeareth in the libell, that sith the statut there ought no suit to be taken for Mortuaries: and the same Law is, if any suit were taken in the Spirituall court for a new dutie that is of late taken in some places vpon leases of Parsonages and Vicarages, which is called Dimission noble, for it appeareth euidently in the libell if any be made thereupon, that no such Proceese ought by the law of the Realme to bee made in that behalfe. But in the case of Tithe corne or grasse, or such other things, wherein thou hast desired to know my mind, there appeareth nothing in the libell but that the suite thereof, of right appertaineth to the spirituall Law, and so for any thing that appeareth, the partie may bee holpen in the Spirituall Court by the prescription: And if the case were so farre put that in the Spirituall Court they would not allow the said prescription, yet I thinke no

pro-

prohibition should lye: For though the spirituall Iudges in a spirituall matter deny ȳ parties of iustice, yet the Kings lawes cannot reforme that, but must remit to their conscience: But if there were some remedie prouided in that case, it were well done: For some men say, that in the spirituall Court they will admit no plee against tythes. And also if a cōposition were made by assent of the Patron and also of the Ordinarie betweene a Parson & one of his parishioners, that the Parson & his successors should haue for a certaine groſſe so many quarters of corne for his tythe yerely, & after contrarie to the composition the Parson in the spirituall Court asketh the tythes as they fall, that in this case no Prohibition should lye, ne yet though the case were further put, that the composition were pleaded in the Court & were disallowed, but all resteth in the conscience of the Iudge spirituall (as is said before.) Howbeit, because some be of opinion that a Prohibition should lye in this last case, therefore I will refer it to the iudgement of other: But in the case of prescription, before rehearsed, I take it for the clearer case, that no prohibition should lie as I haue said before. And I beseech our Lord that this matter & such other like thereto, may be so charitably loked vpon, that there bee not hereafter such diuisions ne such diuersities of opiniōs therin, as hath bin in time past, whereby hath followed great costes and charges to many persons in this Realme: And that hath moued mee to speake so farre in this Chapter, and in diuers other Chapters in this present

booke

booke as I haue done: Not intending thereby to giue occasion to any person to withhold his t thes that of right ought to bee paied, ne to alter the portion therein before accustomed, but that (as me thinketh) they ought to be claimed by the said title as they ought to bee paied, and by none other. And that it may also somewhat appeare that the said statute of 45. Edw 3. was well and lawfully made, and vpon a good reasonable consideratiõ, and that the said prescription is good also, so that no man was in any danger of excommunication for the making of the said statute, nor yet is not for the obseruing thereof, ne yet of the said prescription, as it is noted by some persons that there should bee. And thus I commit thee vnto our Lord, who euer haue both thes and mee in his blessed keeping euerlastingly. Amen.

The Table of the first *Booke.*

THe Introduction.
Of the law eternall. Cap. 1
Of the law of reason, the which by Doctors is called the Law of Nature of reasonable creatures. 2
Of the law of God. 3
Of the law of man. 4
Of the first ground of the law of England. 5
Of the 2. ground of the law of England. 6
Of the 3. ground of the law of England. 7
Of the 4. ground of the law of England. 8
Of diuers cases wherein the Student doubteth whether they be onely maxims of the law, or that they be grounded vpō the law of reasō 9
Of the 5. ground of the law of England 10
Of the 6. ground of the law of England. 11
The first question of the Doctor, of the Law of England and conscience. 12
What synderesis is, 13
Of reason. 14
Of conscience. 15
What is equitie. 16
In what maner a man shall be holpen by equitie in the laws of England. 17
Whether the statute hereafter rehearsed by the Doctor be against conscience or not. 18
Of what law this question is to bee vnderstood that is to say, where conscience shalbe ruled after the law. 19
Of diuers cases where conscience is to be ordered after the law. 20

The first question of the Student. 21
The 2. question of the Student. 22
The 3. question of the Student. 23
The 4. question of the Student. 24
The 5. question of the Student. 25
A question made by the Do. how certain recoueries that be vsed in the kings Court to defeat tailed land, may stand with conscience. 26
The first question of the Student, concerning tailed lands. 27
The 2. question of the Student cocerning tailed lands. 28
The 3. question of the Sudent concerning tailed lands. 29
The 4. question of the student concerning recoueries of inheritance intailed. 30
The 5. question of the student concerning tailed lands. 31
The 6. question of the student concerning tayled lands. 32

The Table of the second Booke.

THe Introduction.
The first question of the student, whether the tenaunt in tayle after possibilitie of issue extinct, may with conscience doe Wast. Cap. 1.
What is vnderstood by this terme when it is said, thus it was at the common law. 2
The 2. question of the studēt, whether the goods of men outlawed be forfeit in conscience as they be by the law. 3

The 3. queſtion of the ſtudent is of Waſt done by a ſtranger in the lands that be in the hãds of particular tenants &c. 4

The 4. queſtion of the ſtudent, whether a man may with conſcieẽce be of coũſel againſt him that he knoweth is the heire of right, but he is certified Baſtard by the Ordinarie. 5

The 5. queſtion of the ſtudent, whether a man may with conſcience bee of counſell with a man at the Common Law, knowing that he hath ſufficient matter to be diſcharged in the Chancery that he may not plead in the common Law. 6

The 6 queſtion of the ſtudent, whether a man may with conſcience be of connſell againſt the feoffee of truſt in an actiõ of treſpas that hebringeth againſt his feoffor of truſt for taking the profits. 7

The 7. queſtion of the ſtudent, if a man that by way of diſtreſſe commeth to his debt, but he ought not to haue diſtrained for it, what reſtitution is he bound to make. 8

For what thing a man may lawfully diſtraine. 9

The 8. queſtion of the ſtudent, whether executors be bound in conſcience to make reſtitution for a treſpaſſe done by the teſtatour, and whether they be bound to pay debts vpon a contract firſt, or make the ſaid reſtitution. 10

The 9 queſtion of the ſtudent, whether he that hath goods deliuered him by force of a legacy, is boũd in cõſcieẽce to pay the debt vpõ a contract that the teſtator ought if the executors haue no other goods in their hãds. 11

The 10. question of the student, if a man haue issue 2. sons and died seised of certaine lands in fee, the eldest dieth without issue, the yongest recouereth by assise of Mordãceſter the land, with damages from the death of the father, whether there hee be bound in conscience to pay the damages to the executors of the eldest brother for the time he liued. 12

The 11. question of the student, what damages the Tenaunt in Dower shall recouer in conscience where her husband dyed not seised, but thee demaunded her dower and was denied. 13

The 12 question of the student, if a man knowing another to haue right to his land, causeth a fine with proclamation to be leuied according to the Statute, and hee that hath right maketh no claime within 5. yeares, whether hee bee barred in conscience as hee is in the Law. 14

The 13. question of the studẽt, if a mã that hath had a child by his wife doe that in him is to haue possession of his wiues lands, and she dieth or he can haue it, whether in conscience he shalbe tenant by the curtesie. 15

The 14. question of the student, if the grantor of a rent enfeoffe the grantee of the rent of part of the lands &c. whether the whole rent be extinct in conscience, as it is in the Law. 16

The 15. question of the student, if he that hath a rent out of two acres be named in a recouerie of the one acre he not knowing thereof

of &c. whether his whole rent be extinct in conscience &c. 17
The 16. question of the student, if a man haue a villeine for terme of life, and the villein purchaseth lands in fee, and he that hath the villein entreth, whether he may with cõscience keep the lands to him and to his heires as he may by the law. 18
The 17. question of the student, if a man in the case next before enforme him that is in the reuersiõ of the villein, that after the death of the villein he hath right to the land & counselleth him to enter, whereupon great suit & charges follow, what daunger that is to him that gaue the counsell. 19
The 18. question of the student is vpon a feoffement made vpõ conditiõ that the feffee shall pay a rent to a stranger, how the feoffement shall weigh in Law in conscience. 20
The 19. question of the student vpon a feoffement in fee, & it is agreed that the feffee shal pay a rent to a stranger, how the feoffement shall weigh in Law and conscience. 21
How vses in land began, and by what law, & the cause why so much land is put in vse. 22
The diuersities between two cases, whereof one is put in the 20. Chapter, and the other in the 21. Chap. of this present booke. 23
What is a nude contract or a naked promise after the laws of England, and whether an action may lye thereupon. 24
The 20. question of the student, if a man that hath two sonnes, one before espousels, and the

the other after espousels, by his wil bequeatheth to his sonne and heir all his goods, which of the sonnes shall haue his goods in consciense. 25

Whether an Abbot may with conscience present to an Aduowson of the Church that belongeth to the house without assent of the Couent. 26

If a man find beastes in his Corne doing hurt, whether he may by his owne authoritie take them and keepe them till hee be satisfied for the hurt. 27

Whether a gift made by one vnder the age of 25. yeares be good. 28

If a man be conuict of heresie before the Ordinarie, whether his goods be forfeit. 29

Where diuers Patrons bee of an Aduowson, the church voideth, the patrons vary in their presentments, whether the Bishop shall haue libertie to present which of the Incumbents that he will. 30

How long time the patron shal haue to present to the benefice. 31

If a man be excommenged, whether he may in any case be assoyled without making satisfaction. 32

Whether a Prelate may refuse a Legacie. 33

Whether a gift made vnder a condition be void if the Soueraign only break the conditio. 34

Whether a couenaunt made vpon a gift to the church that it shall not be aliened, be good. 35

If the Patron present not within vj. moneths, who shall present. 36

Whe-

Whether the presentment and collation of all benefices and dignities voiding at Rome belong onely to the Pope.
If a house by chance fall vpon an horse that is borowed, who shall beare the losse. 38
If a Priest haue won much money by saying Masse, whether hee may giue those goods or make a will of them. 39
Who shall succeed a Cleike that dyeth intestate. 40
If a man be outlawed of Felonie, or be attainted for murther or felonie, or that is an Atcismus, may he slaine by euerie stranger. 41
Whether a man shall bee bound by the act or offence of his seruant or officer. 42
Whether a Villeine or a bond man may giue away his goods. 43
If a Clarke be promoted to the title of his Patrimonie and after selleth his patrimony, and falleth to pouertie, whether he shall haue his title therein. 44
Diuers questions taken out by the Student of the summs called Summa Rosella, & Samma Angellica, which me thinketh are necessarie to bee seene how they stand and agree with the law of the realme. 45
Where ignorance of the Law excuseth in the Laws of England, and where not. 46
Certaine cases & grounds where ignorance of the deed excuseth in the Lawes of England, and where not. 47
The first question of the D. how the law of England may bee sayd reasonable that prohibiteth &c. 48

The

The 1 queſtion of the D. whether the warrantie of the yonger brother that is taken as heire, becauſe it is not knowne but that the eldeſt brother is dead, be in conſcience a bar to the eldeſt brother, as it is in the law. 49

The 3. queſtion of the D. whether if a man procure a collaterall warrantie, to extinct a right that hee knoweth another man hath to land, be a bar in conſcience as it is in the law. 50

The 4. queſtion of the Doct of the wreck of the Sea. 51

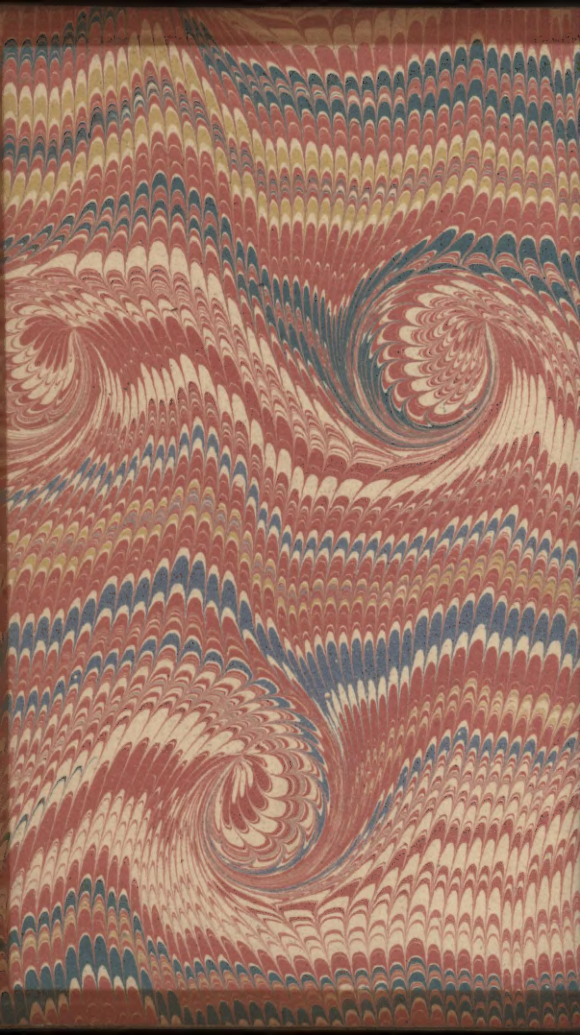
The 5. queſtion of the D. whether it ſtand with conſcience to prohibite a Iurie of meat and drinke till they be agreed of their verdict. 52

The 6. queſtion of the Do. is whether the colours that bee giuen at the Common Law in Aſſiſes, actions of treſpaſſe, and diuers other actions, ſtand with conſcience, becauſe they be moſt commonly feined, and not true 53

The 7. queſtion of the D. concerning the pleading in Aſſiſe whereby the tenants vſe ſometime to plead in ſuch manner that they ſhall confeſſe no Ouſter. 54

The 8. queſtion of the Do. how the ſtatute that was made in the 45. yeare of Edw. 3. concerning the title of wood may ſtand with conſcience. 55

FINIS.



DIALOGUE
BETWEENE
DOCTOR
AND
STUDENT

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